C L I F F O R D

C H A N C E

A GUIDE TO DEBT AND EQUITY CAPITAL MARKETS IN GERMANY

CLIFFORD CHANCE

International law firm Clifford Chance combines the highest global standards with local expertise. Leading lawyers from different backgrounds and nationalities come together as one firm, offering unrivalled depth of legal resources across the key markets of the Americas, Asia, Europe and the Middle East.

The firm focuses on the core areas of commercial activity: corporate and M&A, capital markets, finance and banking, real estate, tax, pensions and employment, and litigation and dispute resolution.

Through a strong understanding of clients' cultures and objectives, Clifford Chance draws on the full breadth of its legal skills to provide results-driven, commercial advice.

Visit our website – www.cliffordchance.com – to learn more about us.

DEBT AND EQUITY CAPITAL MARKETS EXPERTISE IN GERMANY

Clifford Chance's capital markets group in Germany combines international experience with a comprehensive knowledge of the local environment and includes both German and U.S. lawyers.

With an extensive team of lawyers, the Clifford Chance capital markets practice is one of the leading practices in Germany. Our team has broad sector knowledge, with particular depth of experience in initial public offerings (IPOs), dual track M&A/IPO transactions, rights offerings, accelerated book build private placements (ABB), capital increases in kind, SEC registered offerings, Reg S investment grade bonds, convertible bonds, hybrid bonds, regulatory capital bonds, high yield bonds, German law registered bonds (*Namens-schuldverschreibungen*), debt issuance programs, commercial paper programs, 144A investment grade bonds, German law assignable loans (*Schuldscheindarlehen*), U.S. private placements (USPPs), public takeovers, post-listing obligations, transparency and market abuse regulations as well as general capital markets and regulatory matters.

Our team in Germany is supported by Clifford Chance's international network.

For further information on capital markets matters in Germany, please contact:

Dr. George Hacket
Partner
Tel: +49 69 7199 3103
george.hacket
@cliffordchance.com

Dr. Gregor Evenkamp
Partner
Tel: +49 69 7199 3158
gregor.evenkamp
@cliffordchance.com

Dr. Axel Wittmann
Partner
Tel: +49 69 7199 3137
axel.wittmann
@cliffordchance.com

Cristina Freudenberger
Partner
Tel: +49 69 7199 1574
cristina.freudenberger
@cliffordchance.com

Dr. Christian Vogel
Partner
Tel: +49 211 4355 5773
christian.vogel
@cliffordchance.com

Dr. Dominik Heß
Partner
Tel: +49 211 4355 5516
dominik.hess
@cliffordchance.com

Dr. Markus Stephanblome
Partner
Tel: +49 69 7199 1516
markus.stephanblome
@cliffordchance.com

Radoslav Lolov
Counsel
Tel: +49 69 7199 3111
radoslav.lolov
@cliffordchance.com

Andrei Manea
Senior Associate
Tel: +49 69 7199 3121
andrei.manea
@cliffordchance.com

Werner Radziwill
Senior Associate
Tel: +49 69 7199 3161
werner.radziwill
@cliffordchance.com

Maks Mencin
Senior Associate
Tel: +49 69 7199 4305
maks.mencin
@cliffordchance.com

Gordana Golubic-Huertas
Associate
Tel: +49 69 7199 1511
gordana.golubic-huertas
@cliffordchance.com

Carla Winslow Kruger
Associate
Tel: +49 69 7199 1583
carla.winslowkruger
@cliffordchance.com

Ramon Beaucamp
Associate
Tel: +49 69 7199 1203
ramon.beaucamp
@cliffordchance.com

Paulina Fecht
Associate
Tel: +49 69 7199 1655
paulina.fecht
@cliffordchance.com

Lara Esser
Associate
Tel: +49 69 7199 1209
lara.esser
@cliffordchance.com

FOREWORD

This guide provides an overview of the most common debt and equity capital markets transactions relevant for private and public companies in Germany and for non-German companies wanting to access the German, European and U.S. capital markets. It also discusses the legal framework and consequences of public offerings, private placements and listings of securities on an exchange, including liability, market abuse and transparency regulations.

This guide is principally written for companies' management, legal departments, investor relations, strategy, accounting and controlling staff as well as key decision makers in German and non-German companies.

Definitions of words and expressions used are contained in the glossary at the end of this guide.

This document does not purport to be comprehensive or to render legal advice. Capital markets transactions are in many cases tailored to specific situations and issuers. This guide describes common scenarios and characteristics of transactions, however many transactions deviate in individual aspects. The descriptions herein are as of December 2024.

Copyright Clifford Chance PmbB 2025. All rights reserved.

CONTENTS

1. German, European and U.S. Capital Markets 3
2. Debt and Equity Capital Markets Instruments 9
3. Initial Public Offerings (IPOS) 17
4. Sec-Registered Initial Public Offerings 33
5. Dual Track Processes 37
6. Spin-Offs 43
7. Capital Increases 50
8. Reg S Investment Grade Bonds 59
9. Convertible Bonds 67
10. Hybrid Bonds 74
11. Debt Issuance Programs 80
12. Assignable Loans (Schuldschein-darlehen) 85
13. 144A Investment Grade Bonds 91
14. High Yield Bonds 103
15. U.S. Private Placements (USPPS) 113
16. Liability in Securities Offerings 119
17. Post-Listing Obligations 125
18. ESG 131
19. Porsche IPO CASE STUDY 136

Glossary 140

1. GERMAN, EUROPEAN AND U.S. CAPITAL MARKETS

1.1	Public Offerings	4
1.2	Private Placements	4
1.3	U.S. Capital Markets	7
1.4	Market Abuse and Transparency	7
1.5	Regulator	8

1.1 Public Offerings

At the core of securities law is the concept of the public offering of securities, which typically requires an approved prospectus. A transaction which is not an offering to the public or which relies on an exemption from the prospectus approval or registration requirement is called a private placement.

German securities law is determined largely by European law, mainly the EU Prospectus Regulation (Regulation 2017/1129 of 14 June 2017), which is directly applicable European law. In addition, there are a wide variety of supplemental, implementational and technical laws and regulations on both the German and European level.

At the core of the European legal framework is the requirement for any issuer offering securities to the public or seeking to list securities on a regulated market of an exchange in the European Economic Area (EEA) to draw up a prospectus.

The prospectus must be approved by a regulator with authority for the particular issuance. A public offer is any offer of securities to the public and includes any communication, in any form and by any means, presenting sufficient information on the terms of the offer and the securities offered, so as to enable an investor to decide whether to purchase the securities.

Similarly, in the United States of America, the U.S. Securities Act of 1933, as amended (Securities Act), requires the filing of a registration statement with the U.S. Securities Exchange Commission (SEC) for any offer or sale of securities to the public, unless an exemption for such transaction is available. European companies accessing the U.S. capital markets generally structure a transaction so as to avoid registration of their securities with the SEC by relying on private placement exemptions.

1.2 Private Placements

Most offerings of securities are made predominantly to institutional investors. For example, in many German initial public offerings of shares (IPOs) more than 90% of the shares are sold to institutional investors rather than retail investors. Many debt transactions avoid offers to retail investors entirely by placing debt securities only to institutional investors in private placements. Private placements allow issuers to avoid many of the obligations and consequences of securities laws, most notably the requirement to publish an approved prospectus for the offer (while a prospectus may still be required for the listing of the securities). While certain securities laws still apply to private placements, especially in the U.S., offers of securities to investors in private placements are based principally on contract law and avoid the scrutiny of the regulator.

Under the EU Prospectus Regulation, the most notable exemptions (which can also be combined) for private placements include:

- offers to "qualified investors" only, who are professional investors deemed not to require a regulator-approved prospectus based on a variety of criteria;
- offers of non-convertible debt securities with a minimal denomination of EUR 100,000 per security or total consideration per investor of at least EUR 100,000; and
- offers to fewer than 150 retail investors per EEA state.

In the United States, the most frequently used exemptions are:

- offers and sales to "qualified institutional buyers" (QIBs) based on Rule 144A under the U.S. Securities Act; QIBs need to have U.S.$100 million or more in assets under management, among other requirements; and
- offers and sales to "accredited investors" based on various exemptions; accredited investors are professional investors who typically would not qualify as QIBs. Unlike sales to QIBs, which are based on Rule 144A, sales to accredited investors are more restricted.

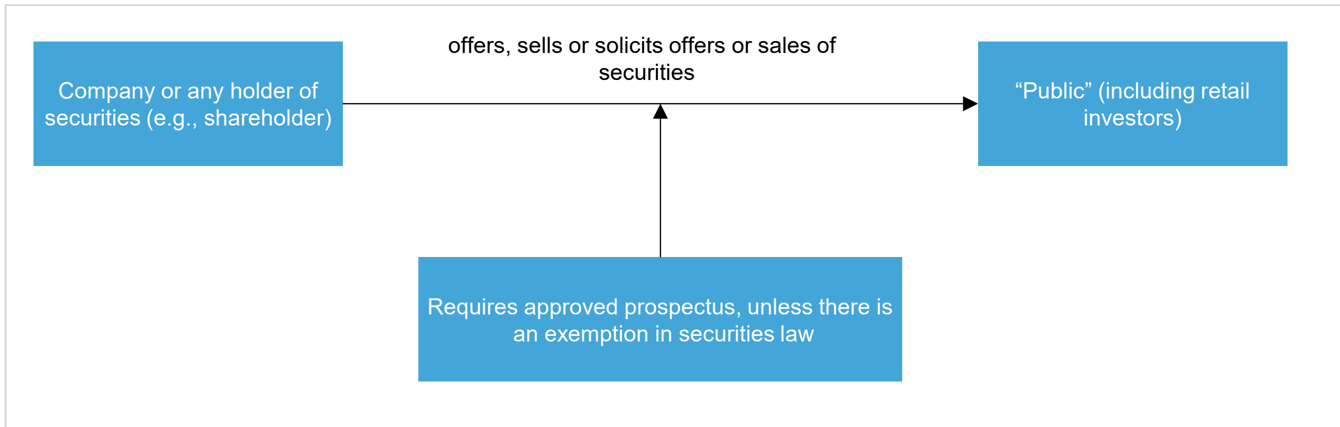
The United States has traditionally taken a globalist, extraterritorial approach to capital markets supervision and as such provides an exemption from the requirement to register securities with the SEC through Regulation S under the U.S. Securities Act (Regulation S or Reg S) for sales to the public which take place outside of the United States to non-U.S. persons.

This exemption applies to all issuers, including European issuers.

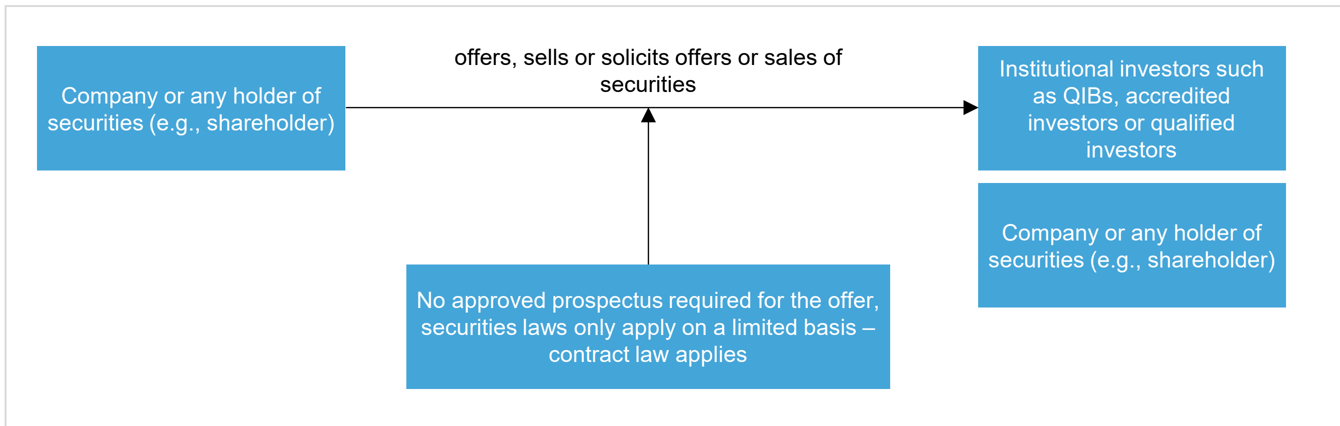
Both in Europe and the United States, several additional private placement exemptions are available, for instance for very small volume issuances.

It has become market practice in Europe to generally refer to securities offerings to investors by whether or not they include sales to U.S. QIBs. Such issuances are often qualified as "Reg-S"-only for transactions in Europe (and potentially elsewhere) but outside the U.S. or, alternatively, as "144A/Reg S" or merely "144A" if an issuance includes both placements to European and U.S. investors (and potentially to other investors worldwide).

Public Offering of Securities

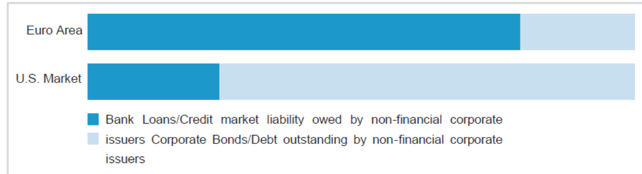


Private Placement of Securities



1.3 U.S. Capital Markets

The capital markets in the United States are, by a significant margin, the deepest market in the world in terms of liquidity, investor demand and several other criteria. The United States market has a long history of being the most important funding source for U.S. companies, while the fractured history of European capital markets means that the majority of the corporate funding in Europe comes from bank lending.



Due to the depth of the U.S. capital markets, many funding transactions by German and other European companies involve public offerings or private placements to investors (usually only QIBs) in the United States. The more investor demand an issuance of securities can attract, the easier it is to successfully place the issuance, achieve a diversified allocation among investors and reach the best possible price for the securities sold. However, even though an offering to both U.S. and European investors has economic benefits for transactions, it is significantly more complex for European issuers to sell securities to U.S. institutional investors in addition to sales in Europe (and potentially elsewhere outside the United States). These issues range from compliance with Rule 144A, to U.S. sanctions and corruption regulation compliance matters, to U.S. tax and Investment Company Act analysis, to added comfort letter complexities and, in particular, due diligence requirements as a result of the U.S. liability regime.

The added complexities involved in a Rule 144A/Reg S securities placement have resulted in a careful cost/benefit analysis between achieving better pricing and more demand by including U.S. investors compared to not tapping into the U.S. capital market; as a general matter, small equity and bond issuances of European issuers below a €150 million offering volume typically do not involve sales to the U.S. Apart from the added complexity, U.S. investors often require a certain amount of liquidity in a security of a foreign issuer to invest.

In contrast, so-called USPPs (private placements of notes to select U.S. investors) are used as a funding source by certain German and European private companies and exclusively target U.S. investors. In addition, large U.S.$ denominated investment grade bonds are often sold in 144A/Reg S transactions. Also, due to specific investor interest in this area, European issuers of larger high yield bonds typically tap the U.S. market in addition to approaching European investors and investors elsewhere.

1.4 Market Abuse and Transparency

Unlike funding from private sources such as bank lending, venture capital contributions or shareholder loans, funds raised via public offerings of securities or listings on a stock exchange in the EEA require the issuer to comply with various capital markets rules including the national implementation laws of the EU Transparency Directive and the EU Market Abuse Regulation, as well as a number of adjunct regulation and technical standards on both the national and European level.

Most notably, the following provisions are applicable to all securities (shares, bonds, warrants and other types of securities) that are listed by the issuer:

- immediate publication of inside information, i.e., non-public, concrete information that can have a material impact on the market price of the securities;
- maintenance of an up-to-date insider list with names and functions as well as certain other information concerning all persons with access to areas with potential inside information;
- publication of notifications of managers' transactions involving relevant securities;
- for listings on a regulated market, ongoing transparency obligations including the issuance of annual reports and interim reports; and
- various other publication and notification requirements depending on the listing market (regulated vs. unregulated) and the type of securities (special obligations for shares).

In practice, issuers of publicly listed securities comply with their post-listing publication requirements by drawing up

internal capital markets guidelines and designating one or more compliance officers, usually a member of the legal or investor relations department to oversee compliance procedures.

1.5 Regulator

In Germany, the regulator for securities issuances and the market authority for all listed securities is the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – BaFin). Within the EEA, each country has retained capital markets authority responsibilities at a national level. However, in practice, a mixed system for capital markets supervision has developed depending on the security:

- any prospectus for a listing or public offering of equity securities (shares and convertible bonds) and debt securities with denominations below EUR 1,000 must be approved by the competent authority of the state in the EEA where the corporate seat of the Company is located, *i.e.*, for a German company, the BaFin; and
- for debt securities with a minimum denomination of EUR 1,000, the issuer can seek approval of the prospectus in any EEA country in which a public offer or listing of the securities is made or its corporate seat is located. Many German issuers choose the Luxembourg regulator *Commission de Surveillance du Secteur Financier* (CSSF) due to its straight forward approach to prospectus review and approval.

Following a listing of securities on an exchange, the applicable supervisory authority for transparency and market abuse purposes may be different from the regulator that originally approved the prospectus, for example:

- in cases where the securities are listed in Germany and the issuer's corporate seat is in Germany (even if the securities are also listed elsewhere in the EEA), BaFin will have jurisdiction;
- in cases where the securities are only listed in Germany, even if the issuer's corporate seat is not in Germany, BaFin will also have jurisdiction;
- in cases where the place of listing of the securities is in an EEA country and such securities are only listed in that country (and not in Germany) the regulator in the country where the securities are listed will have jurisdiction, even for German issuers.

In cases involving multiple listings of securities in different EEA countries, for market manipulation prevention and certain other trading-related matters, regulators in several jurisdictions can have authority. In other special situations, analysis should be undertaken to determine which authority has jurisdiction.

Where securities of a German or other European company are listed on the NYSE or Nasdaq, the SEC is the relevant securities authority.

In cases involving a listing of securities in Germany (or another EEA member state) and in the United States (such as on a U.S. national stock exchange or Nasdaq), both the applicable European authority and the SEC have authority.

The SEC also monitors and has authority over any U.S. securities law breaches, for instance in private placements to QIBs in the U.S. The SEC's authority even extends to securities issuances outside the U.S. if such issuances are not compliant with a safe harbor provision, such as Regulation S (*e.g.,* offerings that try to avoid the application of U.S. securities laws by issuing securities to U.S. persons in offshore transactions).

2. DEBT AND EQUITY CAPITAL MARKETS INSTRUMENTS

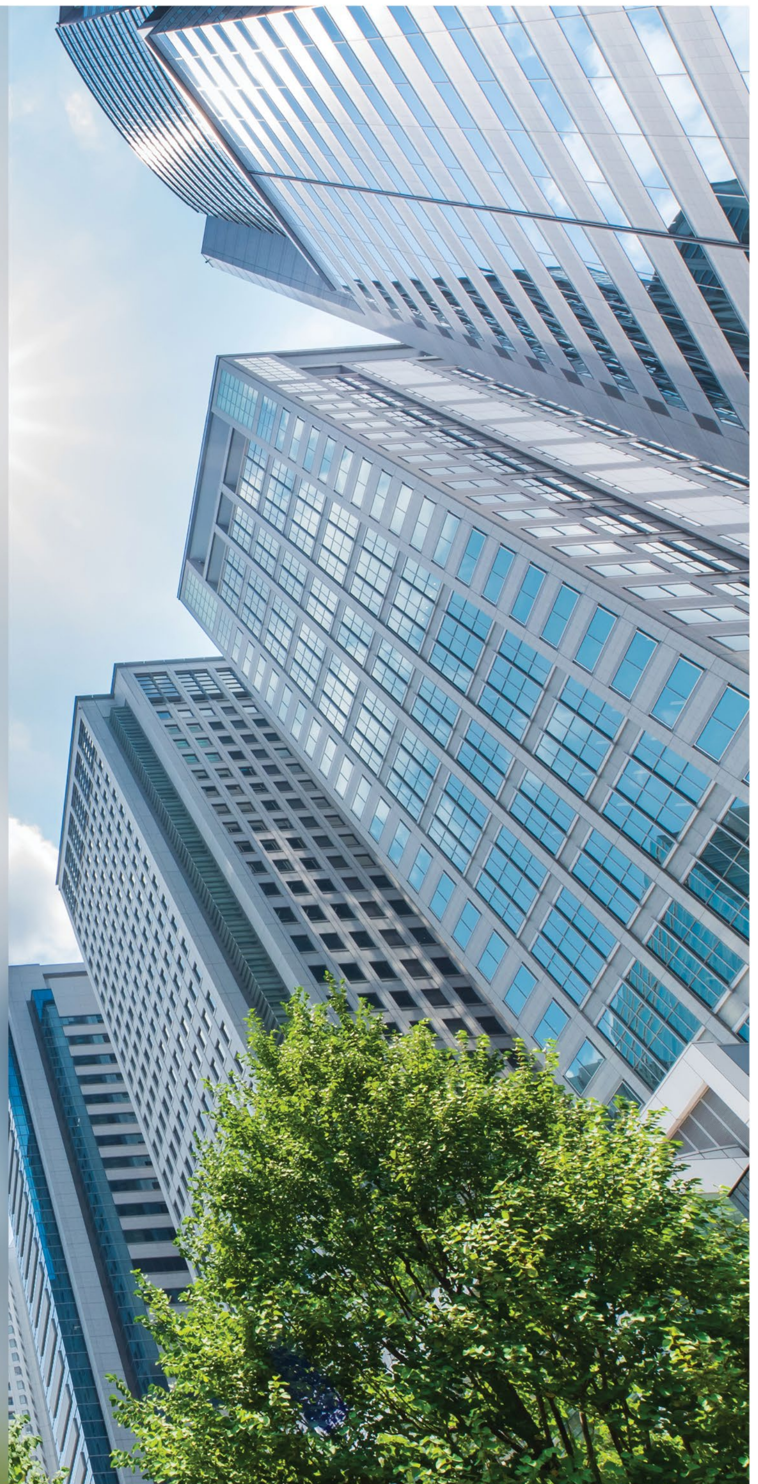
2.1 Introduction 10

2.2 Equity Securities in German Capital Markets 10

2.3 Equity-Linked and Hybrid Instruments 11

2.4 Capital Markets Debt Instruments 11

2.5 Typical Funding Sources for Different Types of Companies 12



2.1 Introduction

Capital markets instruments can be divided broadly into equity, debt and instruments which are equity-debt hybrids. Capital markets instruments can also be classified by type of issuer: regulated issuers (banks and insurance companies), government entities and non-regulated corporate issuers. Debt issuances by non-governmental issuers can also be split into investment grade bonds, high yield bonds, and equity-like hybrid bonds.

Corporate bonds make up less than 20% of the overall European bond market, which is dominated by government bond issuances. In 2023, there were approximately 1,300 issuances of corporate bonds raising approximately EUR 800 billion, of which investment grade bonds amounted to approximately EUR 700 billion and high yield bonds amounted to approximately EUR 100 billion.

On the equity side, the amount of capital raised via IPOs and capital increases (in particular via so called "rights offerings" in which subscription rights of new shares are provided to existing shareholders) varies widely from year to year, but in general makes up far less than the amount of capital raised through debt offerings. This principally relates to the fact that debt capital markets function both as a source of refinancing for existing debt and as a primary source of capital, in contrast to equity capital. The total equity capitalization of all listed companies in Europe is approximately one-quarter that of U.S. companies, despite roughly equivalent GDPs. This is also reflected in the lower number of IPOs and lower overall IPO and equity capital proceeds raised in Europe compared to the U.S. Non-institutional investors (retail investors) in Europe also hold significantly lower interests in European public companies compared to the U.S.

Equity and debt are ranked differently in terms of priority, *i.e.*, which instruments will pay out first in an insolvency. Equity and equity-like securities are generally riskier for investors because they are ranked lower in terms of priority than debt instruments, which means that in the event of an insolvency holders of equity and equity-like securities often do not receive any share of the overall assets or only a small percentage of the initial investment.

2.2 Equity Securities in German Capital Markets

The types of equity securities an issuer is able to offer are principally governed by corporate law in the jurisdiction in which the issuer is incorporated.

The types of legal corporate forms which can be used to list shares on a public exchange in Germany are the German stock corporation (*Aktiengesellschaft* – AG), the European public limited liability company (*Societas Europaea* – SE) and the German limited partnership with shares (*Kommanditgesellschaft auf Aktien* – KGaA). The AG is the most commonly used form, followed by the SE, with the KGaA in limited use (principally used for traditionally family-owned or trust-owned businesses who want to continue to control the company long-term post-IPO).

In each case, there can be two types of shares:

- common shares (*Stammaktien*), which provide the same voting and dividend rights to each shareholder; and
- non-voting preference shares (*Vorzugsaktien*), which provide a preference in relation to dividends and have priority over common shares in a liquidation, but do not carry voting rights as long as the preferred dividends are paid.

While preference shares are used by some German companies, especially large companies, their usage is limited among younger and smaller companies. This is also due to legal restrictions in creating several classes of shares and setting their characteristics.

Since January 1, 2024, the German Stock Corporation Act (*AktG*) allows the issuance of multi-vote shares with voting power of up to 10 times normal voting power. These multi-vote shares are non-transferable and can be implemented only up to 10 years after which the shareholders meeting has to again vote on such multi-vote structures. As of 2024, no IPO in Germany has yet used a multi-vote share structure. In contrast, such structures have been used for many years in the US and more recently also in the Nordics, the UK and other European countries.

Most German issuers use shares in bearer form (*Inhaberaktien*). Bearer shares can be transferred without an entry into a shareholder register, but are legally transferred

by "handing over" the shares (in practice the transfer of ownership is completed electronically via a clearing system). This is a difference to many jurisdictions worldwide, where so-called "registered shares" are often predominantly or exclusively used. German issuers may also issue registered shares (*Namensaktien*). Registered shares are most notably used by German issuers which would like to know who their shareholders are at any given time and, respectively, need to be able to object to the purchase of shares by certain shareholders for regulatory purposes. A special form are registered shares with restricted transferability, the transfer of ownership of which is subject to the consent of the public limited company.

Shares can be either par value or no-par value shares. While par value shares represent a fixed amount of the share capital in Euros, no-par value shares represent a percentage of the company's share capital.

2.3 Equity-Linked and Hybrid Instruments

Equity-linked instruments are bonds that are convertible, either optionally or mandatorily, into shares at a specified strike price. In the ranking of the capital structure, they are, together with long-dated hybrid instruments, the most "equity-like" capital markets instruments. However, because from a legal and tax perspective they constitute interest-paying debt capital, equity-linked instruments rank above non-voting preference shares and common shares.

Long-dated hybrid bonds of corporate issuers are subordinated bonds without a conversion feature into equity, with maturity dates typically 30 years or longer (sometimes these bonds are issued as undated bonds without a maturity date). Their terms and conditions include various features required from an accounting, tax and rating perspective in order for the bonds to be partially treated as equity and partially as debt.

This includes the issuer's option to defer interest payments and limited or no events of default. These instruments are thus ranked above preference shares and common shares and have to either be *pari passu* or subordinated to any other outstanding debt instrument.

2.4 Capital Markets Debt Instruments

A wide range of debt instruments have evolved in German and other capital markets to suit the needs of companies' capital structures, including senior bonds, subordinated bonds, high yield bonds and privately placed debt instruments, such as USPPs and German law assignable loans (*Schuldscheindarlehen*).

Capital markets practitioners usually divide these instruments, for procedural, documentation and marketing reasons, into various subsets, including:

- Investment grade bonds issued as stand-alone bonds or as part of a debt program in Germany and other European countries, but outside the United States (**Reg S investment grade bonds**);
- Investment grade, large volume U.S.$-denominated bonds issued to investors in Europe, the United States and potentially other countries, typically to fulfill U.S.$ needs of larger companies or specialist companies (**144A/Reg S investment grade bonds**);
- Non-investment grade bonds issued to investors in Europe and, for larger transactions, typically also to investors in the United States and potentially other countries (**high yield bonds**);
- Investment grade notes placed via a U.S. private placement directly to investors solely in the United States (**USPPs**);
- German law assignable loans placed to German banks, insurance companies and select German and international institutional investors such as funds (**Schuldscheindarlehen**) and German law registered bonds (**Namens-Schuldverschreibungen**);
- Commercial paper programs with placements of promissory notes with less than a one-year maturity to European (**Reg S commercial paper programs**) and U.S. investors (**144A commercial paper programs**); and
- Secured bonds, covered bonds and asset-backed financing, *e.g.*, ABS financing.

While investment grade bonds are ranked within the capital structure almost exclusively as senior bonds, other instruments can be ranked either as senior or subordinated and can be secured or unsecured. For instance, high yield bonds can be senior or subordinated and structured in various ways depending on the needs of the issuer and its shareholders.

Apart from the above, there are various specialized other instruments, such as other mezzanine financing, warrants, project bonds and co-operative shares (*Genossenschaftsanteile*), that can also be used for capital markets financing.

The following table shows selected key capital markets instruments and credit instruments for German companies grouped by risk profile. Companies' actual capital structures differ depending on the specific instruments that an individual company has outstanding:

Ranking	Capital Instrument		Risk
Equity Capital	Common shares	Non-voting preference shares	High
	Shareholder loans and other shareholder non-share equity instruments		
Hybrid/Equity -Like Capital	Mezzanine capital	Long-dated or undated bonds (hybrid bonds)	
	Mandatory convertible bonds, optionally convertible bonds and bonds with warrants attached		
Debt Capital	144A/Reg S high yield bonds	Reg S high yield bonds *Mittelstandsanleihen*	
	U.S. private placements (USPPs); German law assignable loans (*Schuldscheindarlehen*)	Investment grade bonds (144A or Reg S)	
	Commercial paper programs (144A or Reg S)	Bank credit facilities	
	Super-senior credit facilities, factoring facilities and secured revolving credit facilities	Asset-backed securities financing, covered bonds (*Pfandbriefe*) and senior secured bonds	Low Risk

2.5 Typical Funding Sources for Different Types of Companies

The following graphics provide an overview of typical funding sources. The use of capital markets, loan and other funding sources vary based on (i) the size of a company, and (ii) whether the company is publicly or privately held, *i.e.*, whether it already has shares listed on an exchange and as a result is subject to market abuse and transparency regulations.

	German Issuers					**Non-German companies tapping the German/EEA market**
	Small Cap Privately Held Corporate Issuers **(*e.g.*, German Mittelstand or start-ups)**	**Large Cap Privately Held Corporate Issuers** **(*e.g.*, companies held by private equity companies)**	**Small Cap Publicly Listed Companies** **(*e.g.*, SDAX companies)**	**Large Cap Publicly Listed Companies** **(*e.g.*, MDAX or DAX companies)**	**Financial Issuers (banks and insurance companies)**	
EQUITY SECURITIES						
IPOs	Yes, but only above a certain size and with a suitable track record	Yes	N/A	N/A	Yes, if privately held companies	Yes, based on German market practice if listing is in Germany
Capital increases without subscription rights	Yes, traditional form of raising pre-IPO equity	Yes	Yes, 20% capital increases, capital increases in-kind	Yes, 20% capital increases, capital increases in-kind	Same as corporate issuers	Conducted based on home market standards
Public rights offerings	No	Typically not required due to limited number of shareholders	Yes	Yes	Same as corporate issuers	Conducted based on home market standards

	German Issuers					**Non-German companies tapping the German/EEA market**
	Small Cap Privately Held Corporate Issuers **(*e.g.*, German Mittelstand or start-ups)**	**Large Cap Privately Held Corporate Issuers** **(*e.g.*, companies held by private equity companies)**	**Small Cap Publicly Listed Companies** **(*e.g.*, SDAX companies)**	**Large Cap Publicly Listed Companies** **(*e.g.*, MDAX or DAX companies)**	**Financial Issuers (banks and insurance companies)**	
EQUITY-LINKED AND EQUITY-LIKE SECURITIES						
Long-dated hybrid bond issuances	Typically not relevant	Yes, but rare	Typically not relevant	Yes, increasingly used by large corporate issuers	Yes, commonly used for regulatory capital issuances	Conducted based on home market standards
Optionally convertible bonds	Relevant as part of pre-IPO convertible bonds (but rare in Germany)	Yes, but rare	Yes	Yes	Yes	Conducted based on home market standards
Mandatory convertible bonds	Relevant as part of pre-IPO convertible bonds (alternatively, convertible loans)	Typically not relevant	Not relevant	Yes	Yes, but rare	Conducted based on home market standards

	German Issuers					Non-German companies tapping the German/EEA market
	Small Cap Privately Held Corporate Issuers **(*e.g.*, German Mittelstand or start-ups)**	**Large Cap Privately Held Corporate Issuers** **(*e.g.*, companies held by private equity companies)**	**Small Cap Publicly Listed Companies** **(*e.g.*, SDAX companies)**	**Large Cap Publicly Listed Companies** **(*e.g.*, MDAX or DAX companies)**	**Financial Issuers (banks and insurance companies)**	
DEBT SECURITIES						
Stand-alone investment grade Reg S bond	Yes, potentially in form of a "Mittelstands-anleihe"	Yes, largely for acquisition refinancing or refinancing (but more likely high yield, due to financing profile)	Yes	Typically not relevant, because of debt programs in place	Typically not relevant, because of debt programs in place	Same as for German companies
144A/Reg S stand-alone investment grade bonds	Not relevant	Yes, largely for acquisition refinancing or refinancing (144A for US-Dollar)	Not relevant	Yes	Yes, but not common	Same as for German companies
European debt program (Reg S)	Not relevant	Yes	Typically no, only relevant for regular issuers	Typically yes	Yes, typically set up due to regular financing needs	For EEA companies, same as for German companies; rare for non-EEA companies, but can be set up
U.S. debt program/ 144A debt programs	Not relevant	Not relevant	Not relevant	Rarely for corporates.	For large international banks or banks with high USD demand	Same as for German companies
European commercial paper program	Not relevant	Typically not relevant	Not relevant	Yes, depending on the company's needs	Yes, often set up due to required liability profile of financial companies	For EEA companies, same as for German companies; rare for non-EEA companies, but can be set up

	German Issuers					Non-German companies tapping the German/EEA market
	Small Cap Privately Held Corporate Issuers (***e.g.,*** **German Mittelstand or start-ups)**	**Large Cap Privately Held Corporate Issuers** **(*e.g.*, companies held by private equity companies)**	**Small Cap Publicly Listed Companies** **(*e.g.*, SDAX companies)**	**Large Cap Publicly Listed Companies** **(*e.g.*, MDAX or DAX companies)**	**Financial Issuers (banks and insurance companies)**	
DEBT SECURITIES						
U.S. commercial paper program	Not relevant	Typically not relevant	Not relevant	Yes, depending on the company's needs	For large international banks	Same as for German companies
High yield bonds	Yes, but typically issued only to European investors or as a *Mittelstands-anleihe*	Yes, often if private equity-owned as part of acquisition financing or refinancing	Typically not relevant	Only for "fallen angels"/to refinance existing high yield bonds	No	Same as for German companies
German law assignable loans (*Schuldschein-darlehen*) and German law registered bonds (*Namens-Schuldver-schreibungen*)	Yes, especially for companies without ratings which do not want to issue bonds	Yes, but investment grade bond issuance may result in lower interest rates	Yes, as part of the overall financing mix	Yes, as part of the overall financing mix	Typically not relevant	Yes, relevant as an alternative to USPP or other private placement debt raisings
U.S. private placements (USPPs)	Yes	Yes, depending on the issuer's requirements	Typically not used	Typically not used, but depends on the financing mix	Typically not relevant	Same as for German companies

3. INITIAL PUBLIC OFFERINGS (IPOS)

3.1 IPO Volumes in Europe and on the Frankfurt Stock Exchange 18

3.2 Place of Listing 19

3.3 Types of IPOs and IPO Processes 20

3.4 Key IPO Players 21

3.5 IPO Readiness and Early Stages of an IPO 23

3.6 Bank Selection 24

3.7 Prospectus 25

3.8 Due Diligence 27

3.9 Comfort Letters 27

3.10 Insurance 28

3.11 Pilot Fishing and Early Look Meetings 29

3.12 Analysts and Research Reports 29

3.13 Underwriting Agreement 29

3.14 Roadshow, Bookbuilding and Pricing 30

3.15 Listing and Settlement 30

3.1 IPO Volumes in Europe and on the Frankfurt Stock Exchange

The number and volume of IPOs in a given year fluctuate widely. During and immediately following the 2008-2009 global financial crisis, IPOs and equity offerings decreased significantly compared to the long-term average, as a result of market downturn, volatility and investor reluctance. Conversely, the IPO boom in 2021 (422 IPOs in Europe; 1035 IPOs in the U.S.) was driven in large measure by the historically low cost of capital, market volatility and a de-SPAC boom at the time, while the low deal count in 2023 (107 IPOs in Europe; 154 IPOs in the U.S.) was mainly attributable to inflation and interest rate hikes in key markets.

Unlike in the U.S., where mid-cap and large-cap IPOs principally opt for listings on the NYSE and Nasdaq (with technology companies often opting for Nasdaq), Europe's IPOs are spread across various European exchanges.

The IPO listing venue is often located in the same jurisdiction as the company's headquarters. Of the 107 IPOs completed in Europe in 2023, more than 90% comprised listings on venues located in the jurisdiction of the issuer's headquarters. Although recent years have seen increased numbers of European "cross-border" IPOs (*i.e.*, companies listing on an exchange outside of their home country), the vast majority of issuers continue to list on one of their home jurisdiction's exchanges.

In Germany as of September 2024, 377 companies were listed on an EU-regulated exchange (274 companies listed on Prime Standard; 103 companies listed on General Standard). 106 companies were listed on exchange-regulated markets with lower transparency requirements (44 companies listed on Scale; 62 companies listed on Basic Board).

The following graph shows the number of IPOs in Europe in recent years:

3.2 Place of Listing

Location of the listing venue in relation to the issuer's corporate seat drives the format, timeline, costs and process of an IPO. There are three scenarios for an IPO with a connection to Germany:

3.2.1. Traditional IPOs

In a traditional IPO scenario, an issuer with a corporate seat in Germany typically pursues an IPO on the Frankfurt Stock Exchange (or alternatively on another German stock exchange). This IPO format entails the fewest legal complications for a German company. In this case, the BaFin is the regulator approving the prospectus and remains the regulator for post-IPO capital markets supervision.

In a traditional IPO scenario, both German corporate law and German securities law are applicable to the issuer with regard to the IPO and all post-listing obligations.

3.2.2. "European" IPO with a public offering in Germany and a listing on the Frankfurt Stock Exchange

While the traditional IPO scenario remains the most common type of IPO in Germany, there has been growing interest across Europe to go public in an EEA country other than the issuer's home country (so-called "cross-border IPOs"). The Euronext Amsterdam has been able to attract many foreign issuers, while the Frankfurt Stock Exchange has also increasingly attracted IPOs of non-German issuers.

There are two primary reasons a company might wish to pursue a cross-border IPO in Frankfurt:

- some German companies with substantial real estate in Germany opt for a pre-IPO move of their corporate seat to Luxembourg, which can provide substantial tax benefits, or (more recently) to the Netherlands due to its flexible corporate governance rules.

  The move requires the issuer to change its corporate form to either a Luxembourg or Dutch entity and to potentially relocate headquarters (for a Dutch N.V. TopCo the headquarters are typically not relocated but remain in Germany). However, Frankfurt may still be the optimal listing venue for such companies;

- an increasing number of companies headquartered in an EEA member state other than Germany seek to conduct an IPO in Germany and to list their shares in Frankfurt. The potential benefits include (i) higher investor demand than if the IPO were conducted in the issuer's home jurisdiction, (ii) improved analyst coverage and (iii) enhanced customer and investor perception.

Such IPOs are typically conducted similarly to traditional German IPOs in process, documentation and investor approach. Certain technical implementations (*e.g.*, settlement or corporate resolutions) and other particularities and processes may add complexity to cross-border IPOs, which should be taken into account early on.

Additionally, the issuer will want its shares to be traded electronically on XETRA, the electronic trading platform of the German Stock Exchange, in order to achieve sufficient trading liquidity of the shares. For the shares to be traded on XETRA, they need to be eligible for clearing through a central counterparty, in this case Eurex Clearing. This so-called "CCP eligibility" is determined by Eurex Clearing based on the jurisdiction where the shares are issued. CCP eligibility of the issuers' shares should be determined at the outset of the IPO process, as corporate re-organization to a CCP eligible jurisdiction may be required.

In cross-border IPOs, the regulator in the issuer's home country approves the prospectus (*e.g.*, for a Luxembourg issuer, this would be the CSSF). However, for a listing of shares in Germany only, post-listing capital markets supervision shifts to the BaFin.

The choice of using a Dutch N.V., Luxembourg S.A. or SE or a German AG, SE or KGaA as the issuer for a company headquartered in Germany should be discussed at the outset of the IPO process. Considerable work-intensive steps are typically necessary pre-IPO to relocate the company's headquarters, change internal processes, complete a tax analysis and implement corporate law requirements.

3.2.3. Cross-border IPOs by non-European issuers listing on the Frankfurt Stock Exchange

Companies from countries outside the EEA can conduct IPOs on European exchanges. However, these cases are even rarer than European cross-border IPOs. International inbound cross- border IPOs would include similar processes but also additional complexities not specifically addressed in this guide.

3.2.4. SEC-registered IPOs

Several European companies have conducted SEC-registered IPOs in the U.S. with listings on the NYSE or Nasdaq.

SEC-registered IPOs differ in process, pre-IPO marketing activities, liability profile for stakeholders, overall timeline and post-listing obligations. SEC-registered IPOs are more complex and involve higher costs than IPOs in Europe. See Chapter 4 *"SEC-Registered Initial Public Offerings"* for further information.

In the past, German and European listed companies have also listed their shares, usually in the form of American depository receipts (ADRs), on the NYSE or Nasdaq. Due to increased U.S. regulatory requirements and limited benefits from an investor and public perception perspective, these secondary listings have become somewhat uncommon.

3.2.5. IPOs of German companies on an EEA stock exchange outside of Germany

Occasionally, German issuers contemplate listing their shares on an EEA stock exchange outside of Germany (*e.g.*, the Euronext Amsterdam or in the past the London Stock Exchange). Depending on the situation, this can mean that the IPO process principally follows the standards and processes of such jurisdiction, instead of those described in this guide.

3.2.6. Secondary listings of shares and supplemental public offerings in Germany

While secondary listings as part of or following an IPO have become uncommon (to avoid split liquidity among exchanges), such listings are still pursued under certain circumstances.

A secondary listing in Frankfurt by a non-German EEA issuer does not usually require significant additional German law-focused effort.

Similarly, if an EEA issuer opts to "passport" a prospectus to Germany in order to simultaneously conduct a public offering in Germany (*e.g.*, to increase retail investor reach for an IPO or for publicity reasons), this requires limited effort, most notably a German translation of the (English-language) summary of the prospectus and certain prospectus disclosures regarding tax and other matters.

3.3 Types of IPOs and IPO Processes

The process, costs and timing for individual IPOs depend on the issuer's size.

3.3.1. Small companies

There is a natural "floor" in terms of market capitalization and offer volume for an IPO. While the Frankfurt Stock Exchange in its various market segments provides relatively low minimum market capitalization (€1.25 million for Prime Standard and General Standard), the costs associated with an IPO, even on the unregulated (exchange-regulated) Scale segment, as well as factors such as market liquidity and investment demand, usually require an IPO market capitalization of at least €30 million.

Small companies usually decide between a listing on the Scale segment (the segment of the unregulated Open Market) or the regulated General Standard of the Frankfurt Stock Exchange. The higher liquidity and transparency requirements of the Prime Standard are typically not relevant for small company investors and thus not necessary for an IPO.

Small company IPOs are almost always conducted as Regulation S only transactions with sales to investors in Germany and other EEA countries, but no sales to U.S. or other international investors. Depending on the investment banks advising the issuer and the transaction-specific circumstances, a targeted U.S. institutional investor approach is possible. However, this entails additional requirements for the preparation of offering materials and involvement of U.S. counsel.

The small company investor base typically comprises German investors such as family offices as well as institutional investors with a focus on small-cap growth companies. The retail component in an IPO fluctuates depending on the company and can be important for increasing the IPO share price and success.

While many elements of the IPO process, such as prospectus drafting, bank involvement, auditor involvement, research reports and the roadshow, are similar regardless of IPO size, small companies can benefit from certain less-strenuous requirements because issuers with limited size and complexity generally require less extensive prospectus disclosure (for IPOs that do not involve U.S. investors).

Certain issuers have opted for institutional pre-placements of shares without a public offering. In these cases, a sufficient number of institutional investors agree to buy the issuer's shares, which are then listed (usually on the Scale segment in Frankfurt). In this situation, all shares will have already been placed upfront eliminating the risk that the IPO fails due to lack of demand on market volatility.

Listing on the Scale segment in Frankfurt without a public offering of shares does not require the preparation of an approved prospectus; companies instead prepare a much leaner "inclusion document". In any case, a Scale listing requires only 2 years of company history (instead of 3 years) and the financial statements can be prepared based on national accounting standards (e.g. HGB financials for German companies).

3.3.2. Small to medium-size companies

Small to medium-size companies with a market capitalization of around €300 to €500 million and an offering volume of up to €150 to €200 million often do not include Rule 144A sales to U.S. institutional investors and rely solely on Regulation S to conduct an IPO. These companies typically list on the Prime Standard of the Frankfurt Stock Exchange, which has the highest transparency standards.

The investor base for such IPOs is broader than for small-cap companies, with roadshows in most cases also being conducted in London, Amsterdam, Paris or other European cities.

3.3.3. International IPOs of medium to large companies

IPOs for issuers with a market capitalization above small to medium-size companies and offering volumes of more than €150 to €200 million are typically conducted as "international IPOs," with a listing on the Prime Standard of the Frankfurt Stock Exchange and sales to institutional investors across Europe, the U.S. and elsewhere (including Canada, Australia or Japan), depending on the issuer and investor interest.

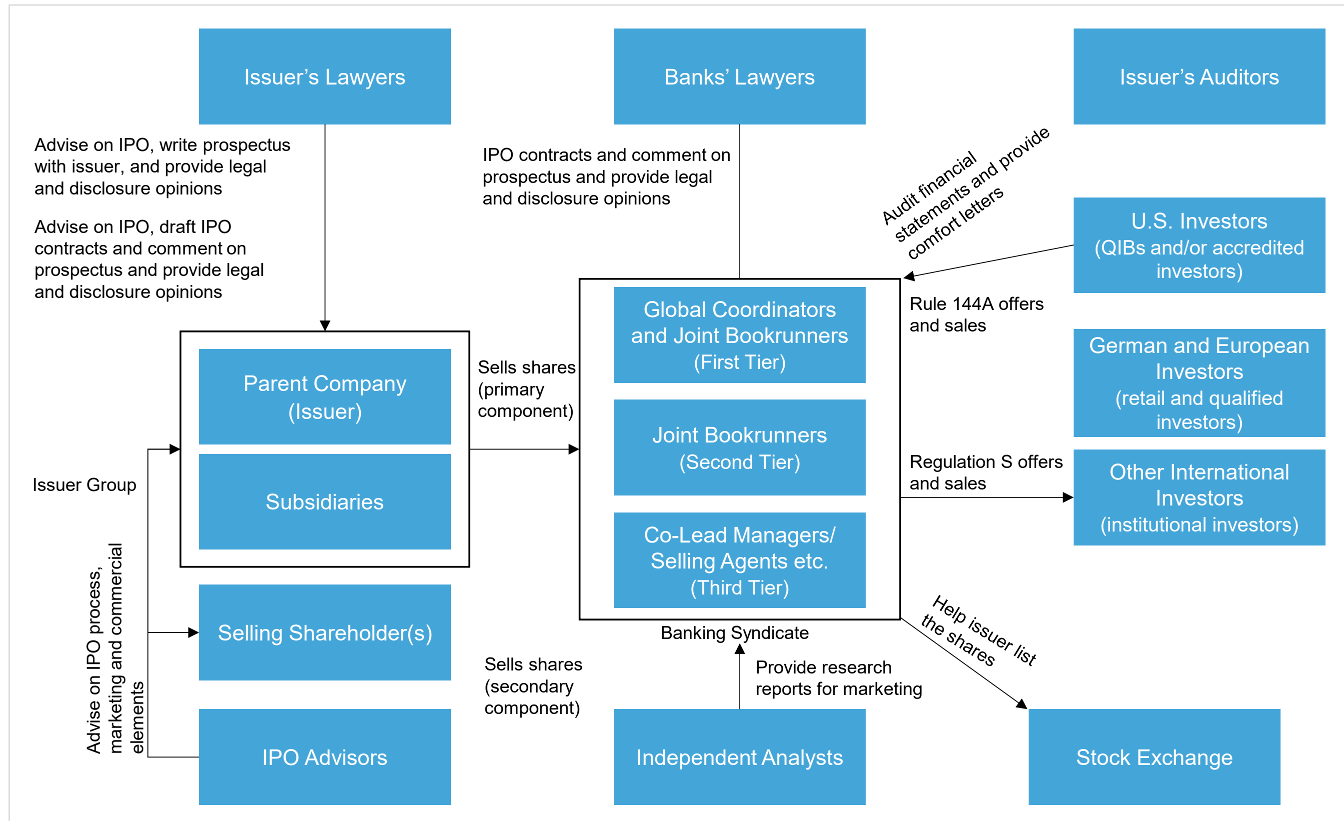
3.4 Key IPO Players

IPOs involve a significant number of parties in various roles. The key players' involvement and roles differ depending on the IPO size, but generally include the following:

- **Issuer:** Issuer's management and employees (typically from the legal, controlling, accounting, strategy and investor relations departments) are intensely involved in all aspects of the IPO process. Other corporate bodies such as the supervisory board or works' council are also involved.
- **Shareholders:** Shareholders may be actively involved in all aspects of the IPO, or at least in all commercial aspects.
- **Investment banks:** The banks' principal role includes marketing the IPO, providing advice on the "equity story" (*i.e.*, the sales pitch to investors on why the investment is attractive), management of the IPO process and various technical requirements (including acting as listing agent for the listing of the shares, underwriting the shares, and acting as settlement agent and stabilization agent).
- **IPO advisors:** As a general market practice since the financial crisis, in many German IPOs, issuers and their shareholders engage special IPO advisors. IPO advisors help structure the process even before investment banks are mandated, advise issuers in negotiating the terms of the investment banks' engagement, advise on marketing efforts and generally assist with management of the IPO execution.
- **Auditors:** Preparation of audited financial statements is a critical lead item in an IPO. Auditors assist issuers prepare the required financial statements (especially for issuers with a complex financial history), audit the financial statements and provide comfort letters to investment banks.

- **PR advisors:** Many issuers also engage public relations advisors to manage press activity, press releases and other communication surrounding the IPO.
- **Legal counsel:** IPOs typically involve separate legal counsel for the issuer and the investment banks. In smaller IPOs, a single transaction counsel is sometimes appointed to reduce cost and complexity. Depending on potential conflicts among shareholders or foreseeable conflicts between the issuer and shareholders, separate counsel may advise the shareholders.

The following chart illustrates the roles and interactions of the key players in an IPO:



Other participants include the BaFin or a different regulator (prospectus approval), the Frankfurt Stock Exchange or other relevant stock exchange (listing application) and a paying agent (payment of dividends). An IPO may also involve strategy consultants, compensation consultants for executive or employee incentive plans, pre-IPO lenders, tax advisors and property appraisers (for real estate company IPOs).

3.5 IPO Readiness and Early Stages of an IPO

The issuer's management and principal shareholders typically discuss the possibility of an IPO with various parties long before the actual IPO process begins. This includes informal discussions with investment banks and legal counsel about the positioning of the company, potential market windows and additional steps to be taken before the IPO process commences, such as internal restructurings, bolt-on M&A, product launches and a sufficient business track-record.

Other items may also be part of an IPO readiness review, including a strategy review, preparation of market studies or internal compliance system changes for regulated businesses.

3.5.1. Financial Statements

Accounting topics should be prioritized in an IPO readiness review. This includes preparation of financial statements required for an IPO and implementation of adequate systems and processes to support post-IPO financial reporting.

The Scale segment of the Frankfurt Stock Exchange allows issuers to use the national generally accepted accounting principles (HGB in Germany) in preparing their financial statements. The General Standard and the Prime Standard require financial statements prepared in accordance with IFRS or national accounting standards that are recognised as equivalent by the EU. The IFRS conversion of financial statements should be completed before inviting investment banks to participate in the IPO process.

For regulatory and marketing reasons, with certain exceptions, consolidated financial statements for the full three most recent financial years (plus interim period, if applicable) are required. The EU Listing Act has reduced the historical financial requirement from three to two years, however, this change will apply from June 2026 onwards.

In addition, recent large acquisitions or mergers may require special "Pro-Forma Financial Statements" in addition to the normal consolidated financial statements. Preparation of financial statements, especially for issuers with complex financial histories (involving acquisitions, disposals or other significant corporate events), often becomes a key timing consideration in an IPO process. An early analysis of financial statement requirements and resolution of potential obstacles are critical in many IPOs.

3.5.2. Corporate Form

Most German issuers use a German stock corporation (*Aktiengesellschaft*) as the listing vehicle in an IPO. Some companies have also used an SE as the listing entity. KGaAs are a less common form of partnership structure with shares which have recently started being used again by issuers.

With an SE, issuers can opt for a one-tier or two-tier board structure. However, one-tier SE board structures are uncommon for German companies. In certain circumstances, an SE can also limit employee participation on boards.

3.5.3. Commercial Elements

An IPO readiness review should also include consideration of the following matters:

- **"Primary" vs. "secondary" offering:** An IPO can involve the sale of existing shares held by shareholders (secondary offering) as well as a capital increase and sale of newly created shares to new investors (primary offering). IPOs often include both a primary and a secondary component.
- **Use of proceeds:** In a primary offering, the intended use of the IPO proceeds can have a significant impact on the equity story and discussions with investment banks. Highly leveraged companies typically must use at least a part of the proceeds to deleverage.
- **International reach:** The jurisdictions in which the offering shall be conducted.
- **Other:** Existing shareholders and the issuer must also decide other points, including (i) post-IPO lock-up periods,

during which pre-IPO shareholders and the issuer may not sell shares, (ii) the listing venue, (iii) the structure and composition of the board, (iv) executive compensation and employee incentive plans; and (v) whether to conduct a so-called dual track process, in which a parallel sale of the company is pursued through an M&A transaction as an alternative to an IPO.

3.6 Bank Selection

Initially, an issuer will typically have informal discussions with investment banks before the start of the IPO process to explore the market acceptance of the IPO. This can be followed by a more formal pitch process where the banks pitch their views on the company and how to best position it in the IPO. Stakeholders then typically select two global coordinators (although this number can also be higher or, in some cases, may only include a single global coordinator) who are tasked to lead the IPO process.

Alternatively, especially in smaller IPOs, one or several lead banks are selected from the outset.

The full IPO syndicate can include banks that are mandated in the second tier or third tier. Syndication enhances the distribution power and coverage for the IPO because different banks have relationships with different investors. Syndication also increases analyst coverage. In an IPO, the global coordinators' as well as the second tier banks' analysts prepare research reports on the issuer to support sales efforts.

Following bank selection, an engagement letter or the key engagement terms are negotiated with the global coordinators. These outline the main terms of the banks' engagement, including fees, representations, warranties and indemnities.

The following table sets out the main elements of an engagement letter:

<table>
<tr><th>Provision</th><th colspan="2">Description</th></tr>
<tr><td>Bank fees</td><td colspan="2">Typically split into a base fee and an incentive fee</td></tr>
<tr><td>Expenses/other gains</td><td colspan="2">Reimbursement of reasonable expenses of global coordinators (often capped to a certain amount), including legal fees; stabilization profits</td></tr>
<tr><td>Parameters of the IPO</td><td>Hard underwriting or best efforts underwriting</td><td>Rule 144A offering/ Regulation S offering; listing venue</td></tr>
<tr><td>Representations & warranties</td><td colspan="2">Extent of issuer's and controlling shareholders' representations and warranties to be provided in the underwriting agreement</td></tr>
<tr><td>Indemnities</td><td colspan="2">Indemnification of the underwriters by the issuer and the controlling shareholders for misstatements and omissions in the prospectus or breach of representations and warranties</td></tr>
<tr><td>Process</td><td colspan="2">Description of process; scope of advice by bankers; key team members</td></tr>
</table>

3.7 Prospectus

The prospectus is the principal disclosure and liability document in an IPO. A prospectus is a legal prerequisite for both a public offering of shares in Germany and elsewhere and the listing of shares on a stock exchange.

Contents of the prospectus are driven by legal requirements:

- A prospectus must include all material information about the issuer's group and the shares. Information is material if it is necessary to enable investors to make an informed investment decision in relation to the shares and an informed assessment of the assets and liabilities, financial position, profits and losses, and prospects of the group.
- The EU Prospectus Regulation and ESMA's technical guidelines also require disclosure of certain specific information about the group (even if it is not material).
- Consolidated (typically for three years and any interim period) and stand-alone (one-year period) financial statements of the issuer must be included.
- All material information provided to investors (in a roadshow or otherwise) or to analysts must be reflected in the prospectus. Therefore, the prospectus drafting process and the process for drafting investor and analyst presentations require close coordination.
- Expert reports (*e.g.*, appraisal reports for real estate companies), may also be required to be included. Start-up companies may be required to include a business plan.

The following should not be included in a prospectus:

- **Factual or specific statements without a reliable source** (*e.g.*, about the issuer's market position or the market generally): care must be taken to verify support of any factual or specific statements; or, if based on the issuer's own analysis, such statements should be qualified. Similarly, exaggerations, misleading statements, incomplete assessments or risk mitigating language used to downplay genuine risks should be avoided. In particular, marketing language (such as "unprecedented leadership", "unparalleled" or "unique") can draw comments from regulators, heighten liability risks and may violate competition laws.
- **Profit forecasts and estimates**: this includes an indication of a specific profit (*e.g.*, EBITDA or EBIT) level or range, as well as unspecified comments setting a floor for the absolute amount of profit.
- **Market data which the data provider has not made public**: however, data can be included if the issuer obtains permission from the data provider. At times, issuers may commission market reports on their industry for use in a prospectus.

Prospectus drafting should generally start as early as possible due to the significant time and effort it requires, especially by the issuer. Prospectus drafting also entails drafting meetings in which the working group discusses and comments on the proposed disclosure.

The approval process in Germany with the BaFin usually takes approximately 8 to 10 weeks and normally involves at least three filings before the BaFin declares the prospectus "free of comments." Approval processes, *e.g.,* with the Luxembourg CSSF can be shorter and are generally more flexible.

The following chart shows the principal prospectus contents:

Section	Description
Risk Factors	Discussion of key risks and threats that are specific to the issuer and its industry
Use of Proceeds	Amount of proceeds expected to be raised in the offering and how the issuer intends to use the proceeds
Capitalization	Table setting forth the issuer's capitalization before and after the offering
Operating and Financial Review	Discussion of the issuer's operating performance (line-by-line discussion of the income statement), including on a segment level; liquidity and financial liabilities for the last three financial years, Discussion of material known trends and uncertainties that will affect the issuer's future financial performance
Business Description	Discussion of the issuer's strengths and strategy Description of the issuer's main business lines and presentation of operational metrics Description of material legal proceedings Description of environmental liabilities Description of intellectual property
Market Overview	Overview of the industry in which the issuer operates; Description of issuer's competition
Material Contracts	Description of contracts that are critical to the issuer's business (e.g., financing agreements, licenses, customer and supplier contracts) or are not in the ordinary course of business
Related Party Transactions	Disclosure of the issuer's related parties and transactions entered into with related parties
Management and Principal Shareholders	Description of issuer's directors and officers and corporate governance Issuer's principal shareholders and the amount of share capital/voting rights they hold before and following the offering
Taxation	Disclosure of tax consequences of ownership of the issuer's shares; typically covers the issuer's home jurisdiction and the U.S. (for Rule 144A offerings)
Financial Statements	Consolidated financial statements for the three most recent financial years (will be reduced to two years starting from June 2026, however, market practice may continue to require three years) and any interim period; stand-alone financial statements for the most recent financial year

3.8 Due Diligence

An IPO process involves "liability management" for all parties.

A securities offering involves the risk of investor claims for damages against the issuer, the issuer's management and other parties who advise on the deal (*e.g.*, investment banks and auditors) if the share price declines following the offering and certain other situations. Investor claims can be based on material misstatements or omissions in the prospectus. For further information see Chapter 16 "*Liability in Securities Offerings*."

Issuers and investment banks seek to reduce the potential risk of claims through a process called due diligence. This involves an examination of the issuer's business, including review of corporate documents, material contracts and other information concerning the issuer's risks, financial condition and operating results. Material findings from the due diligence process are disclosed in the prospectus.

The main components of due diligence for an IPO are:

- **Management due diligence**: This is handled in face-to-face meetings at the outset of the IPO, in which the banks and their counsel discuss a broad range of topics concerning the issuer's business with the issuer's management. Discussions of topics that involve specialist departments (*e.g.*, compliance, litigation or tax) can be scheduled separately.
- **Documentary due diligence**: Based on a request list, usually prepared by the banks' counsel, the issuer makes available all documents related to its material business dealings, financial reporting, corporate affairs, regulatory and tax compliance, and litigation. The documents are assembled in a dataroom (typically in electronic format) which is accessed by counsel. Due to the significant effort and lead-time required to collect relevant documents, this workstream should be prioritized early in the IPO, potentially before the kick-off meeting (although in traditional market practice, the dataroom is often structured on the basis of the request list, which is only provided after the underwriting banks and their legal counsel have been appointed).
- **Business plan review**: Banks undertake a plausibility analysis of the issuer's business plan.
- **Bring down due diligence**: Calls with issuer's management take place shortly before the IPO launch, pricing and closing to discuss recent developments and to confirm that the issuer is not aware of any material changes that could be of relevance to investors.

3.9 Comfort Letters

An additional liability management tool is the auditors' issuance of comfort letters regarding the accuracy of the issuer's financial information that is disclosed in the prospectus. Comfort letters are addressed to the banks and the issuer.

In Regulation S-only transactions, a so-called IDW PS 910 German-style comfort letter is required. In a transaction which includes sales into the U.S., a so-called SAS 72 comfort letter for purposes of the U.S. private placement is added. A U.S. comfort letter requires auditors to perform additional procedures and increases the auditors' fees significantly. An IDW PS 910 letter is the standard required by the German *Institut Deutscher Wirtschaftsprüfer* (IDW) and is accepted by banks in German transactions. SAS 72 is the standard promulgated as part of the U.S. Statements on Accounting Standards (SAS).

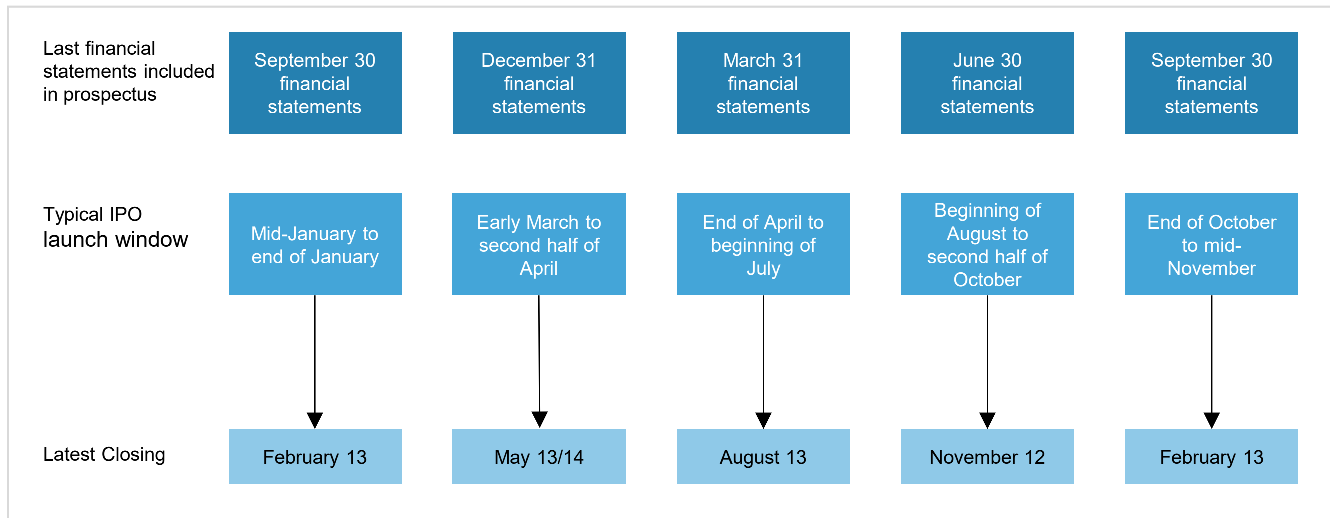
The comfort letter process involves substantial effort in coordination among the issuer's accounting staff, auditors and counsel.

A common pitfall results from the inclusion in the prospectus of "controlling numbers" or estimates which cannot be reconciled to the issuer's accounting system. Unreconciled figures cannot be covered in the comfort letter. This leads to protracted discussions on whether the figures should be removed from the prospectus and other marketing materials or whether the working group is comfortable that the figures are correct without the auditors' comfort. In cases where no comfort can be provided by auditors on certain figures, due diligence efforts have to be completed via discussions or "back-up" materials provided by the company, or the figures should be deleted from the prospectus and other marketing materials.

Comfort letters limit the market windows for IPOs due to restrictions on providing so-called "negative assurance." Negative assurance serves to confirm, at the time the comfort

letter is issued, that there has been no material deterioration in the issuer's financial position since the last audited or reviewed financial statements. Negative assurance cannot be provided more than 135 days after the date of the last audited or reviewed financial statements. Therefore, an IPO which presents audited financial statements for a year ended December 31 must be completed no later than May 13/14 (depending on if it is a leap year) of the following year.

The following chart shows the periods during which an IPO can be launched based on the last audited or reviewed financial statements included in the prospectus:



3.10 Insurance

Issuers typically take out three types of insurance to cover risks in connection with an IPO:

- **Management insurance**: Prior to an IPO, most issuers carry directors' and officers' (D&O) insurance. However, in most cases, pre-IPO D&O insurance does not cover liability in connection with an IPO. Management can be insured through extension of existing D&O insurance or a separate IPO policy.
- **IPO insurance**: IPO insurance covers, up to a certain amount, claims brought by investors against any covered member, in particular the issuer, shareholders, banks and (potentially) auditors. Whether to take out IPO insurance is a decision for the pre-IPO shareholders and issuer.
- **Auditors' insurance**: If there is no IPO insurance covering auditors, a separate insurance for the auditors for comfort letter purposes is usually required. This is because auditors limit their liability for the PS 910 German-style comfort letter to an amount that, for most offerings, is not acceptable to investment banks.

Insurance is costly and premiums are tied to offering volume and scope of coverage. Insurance brokers require a close-to-final draft of the prospectus to provide a final quote for insurance (indicative quotes are provided earlier).

3.11 Pilot Fishing and Early Look Meetings

Investor meetings before an IPO announcement in the form of so-called pilot fishing meetings (also called "early look" meetings) have become a staple feature of IPOs.

The working group will prepare a presentation for use in the meetings that outlines the company's equity story, including key strengths, business overview, market position and strategy.

Commercially, early investor meetings are important for refining the equity story, focusing on critical questions from investors and procuring investor feedback on the initial estimate of the company's market capitalization and investor interest in the IPO.

3.12 Analysts and Research Reports

Another major IPO work stream is the preparation of analyst research reports.

Analysts are independent researchers employed by banks who are tasked to provide an assessment of the issuer and the issuer's valuation (based on a comparability analysis, discounted cash flow analysis or other valuation techniques). This assessment is captured in the analyst's research report.

To provide analysts with information required to write research reports, the IPO working group prepares an analyst presentation. The presentation sets out the issuer's business, strategy, key financial and operating data, and market position. The issuer's management meets with analysts to deliver the presentation, usually over a one to two-day period.

Analysts prepare their reports within 2 to 4 weeks following the presentation. The IPO working group then reviews the draft reports for factual accuracy, but refrains from commenting on the analysts' valuation of the issuer so as not to compromise the analysts' independent assessments.

3.13 Underwriting Agreement

The principle legal document that governs the transaction relationship between the banking syndicate and the issuer is the underwriting agreement. It includes the key commercial terms and key representations and warranties, indemnities and other elements agreed in the engagement letter, but also specifies the issuance process, termination rights and conditions precedent. For German IPOs, the governing law is typically German law.

The market practice in Germany differs from other jurisdictions in so far as the underwriting agreement in Germany is typically signed on the date that the prospectus is approved. The contractual obligations in the underwriting agreement are, however, only binding if the actual pricing occurs. In order to set the price, volume and allocation of shares among banks, the parties sign a short pricing agreement at the end of the bookbuilding period, when the price per offered share is determined. A less common alternative in the German market is to sign a launch agreement with a negotiated underwriting agreement as an annex at the beginning of the offer period and sign the underwriting agreement at pricing, as is market practice in the UK and the U.S.

3.14 Roadshow, Bookbuilding and Pricing

Towards the end of the IPO preparation phase, and once the analyst research reports are ready for distribution to investors, the issuer prepares a so-called intention to float announcement (ITF).The ITF is a public announcement of the IPO in the form of a press release.

Following the ITF and before launch of the IPO, the issuer and banks continue meeting with investors. The aim of the meetings is to gauge investor demand for the IPO.

Following the meetings (which take around one week), assuming positive feedback and market conditions, the decision to launch the IPO is made and a range for the share price (or a fixed share price for small offerings) is set. The prospectus is then finalized, approved by the regulator and published.

Following launch, the issuer and banks conduct roadshow investor meetings in various cities, which usually last up to 14 days in total. Some of these meetings are virtual and some physical. Within this period (the offer period), investors deliver their orders for a specific number of shares at a specific price within the price range. Orders are recorded in an electronic "book" and hence the process is called "bookbuilding."

On the last day of the offer period, the issuer, its shareholders and banks analyze the book, set a price for the shares and allocate shares to investors. In allocating to retail investors, discrimination among investors is not allowed, unless the allocation criteria were previously disclosed in the prospectus. However, the issuer can freely select which institutional investors to include and allocate shares to them as the issuer sees fit on the basis of advice received from the banks.

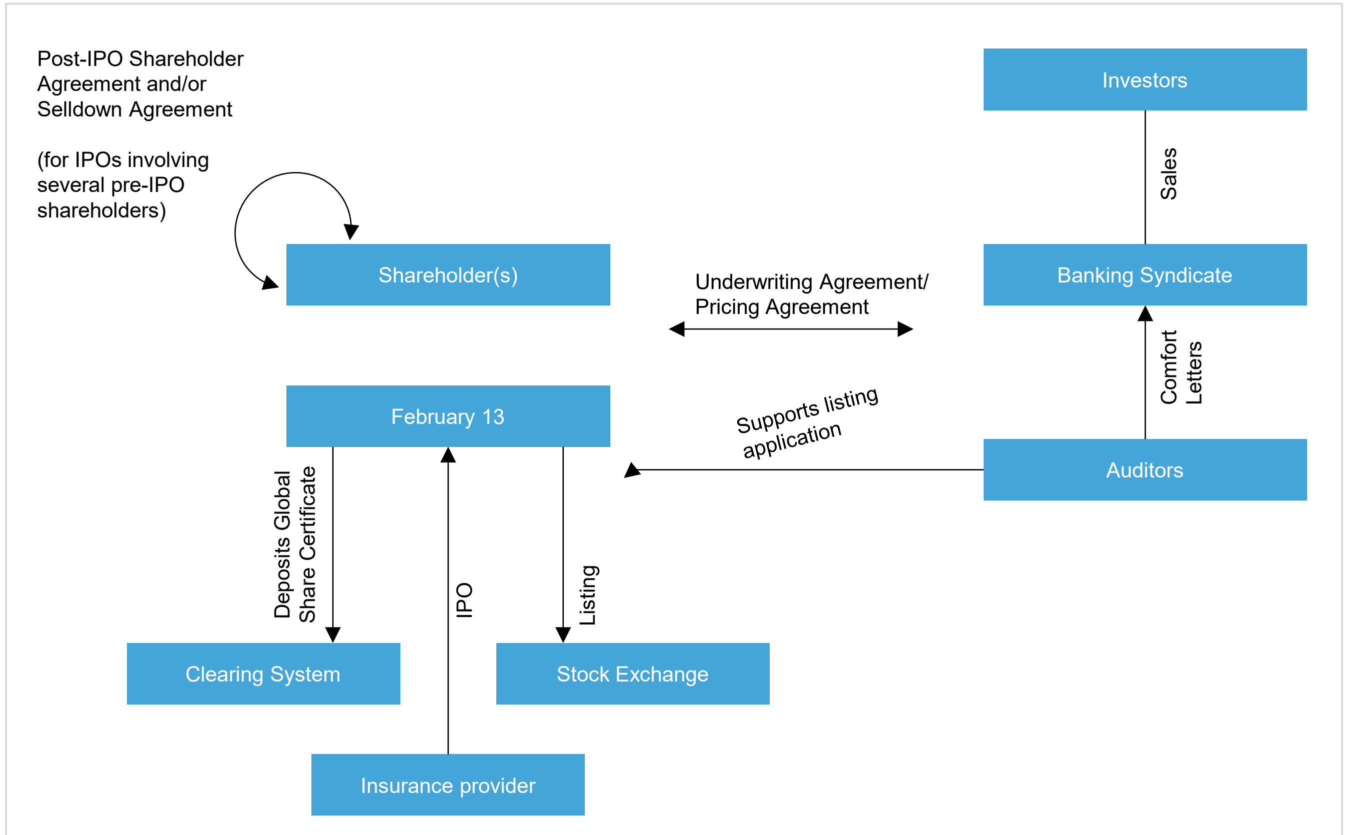
The issuer, its shareholders and the banks then enter into a pricing agreement to set out the share price and final number of shares to be sold in the IPO, which information is then published by way of a pricing announcement.

3.15 Listing and Settlement

After pricing, several technical steps are taken to create any new shares, to finalize the listing of the issuer's entire share capital and to prepare for settlement.

On settlement day, which is usually 2 or 3 trading days after pricing (T+2/T+3), the shares are transferred to investors against cash payments. The banks then provide the cash payment to the issuer and/or shareholders, in most cases after having deducted the banks' fees.

For an overview of post-listing obligations, see Chapter 17 "*Post Listing Obligations*".


Post-IPO Shareholder
Agreement and/or
Selldown Agreement
(for IPOs involving
several pre-IPO
shareholders)
Investors
Sales
Shareholder(s)
Underwriting Agreement/
Pricing Agreement
Banking Syndicate
Comfort
Letters
February 13
Supports listing
application
Auditors
Deposits Global
Share Certificate
IPO
Listing
Clearing System
Stock Exchange
Insurance provider

5-8 months prior to pricing	4-6 months prior to pricing	3-4 months prior to pricing	2 months prior to pricing	1 month prior to pricing	2 weeks prior to pricing	Pricing	T+2/T+3
Pre-IPO Structuring	**IPO Kick-off**	**Develop Equity Story**	**Analyst Presentation**	**Pilot Fishing and Investor Education**	**Bookbuilding and Roadshow**		**Closing**
• Appoint or at least discuss IPO plans with legal counsel and investment banks; potentially also discuss the plans with accountants • Start any necessary pre-IPO corporate reorganizations and start to think about setting up of internal functions required for IPO and post listing obligations • Recruit any additional resource needed for IPO process (*e.g.*, financial/ legal/ investor relations) • Complete/ plan any refinancing or acquisitions • Clarify any regulatory implications/ requirement	• Appoint key advisors, *i.e.*, underwriters, IPO advisor (if required) • All parties kick-off meeting • Search for additional supervisory board members, if required • Update data room • Agree offer structure *i.e.*, Primary/ secondary • Agree timing of availability of financial information • Consider what lock-up periods will be acceptable to the shareholder(s) • Agree publicity guidelines • Commence discussions with current lending banks on restrictions for IPO on bank facility side (at the latest)	• Review of documents in data room • Management due diligence meeting • Initial prospectus drafting meetings • 1st submission of prospectus for BaFin/ regulator review • Draft underwriting agreement circulated • Review website content • Discuss D&O prospectus cover with insurance brokers (if not already in place for IPO purposes) • Usually pilot fishing/ early look meetings with investors happen in this phase	• Prospectus drafting continues • Complete initial data room review • Further BaFin/ regulator submissions of prospectus • Negotiation of underwriting agreement • Finalize executive and senior manager compen-sation/ share plans • Appoint financial printer for prospectus • Appoint PR advisors (if required)	• All BaFin/ regulator comments cleared • All material issues in underwriting agreement resolved • Distribution of research by independent research analysts • Publication of intention to float announce-ment • Continuing pilot fishing/investor education • At the latest, changes in corporate structure implemented (*e.g.*, conversion into AG + shareholder resolution to carry out IPO)	• BaFin/ regulator prospectus approval • Underwriting agreement signed (includes lock-up) • Board meeting to approve prospectus and commence-ment of management roadshow • Print prospectus • Management roadshow meetings with investors for approximately 10-14 days	• Determine price based on book-building • Pricing board meeting to agree price and execution of the pricing agreement • Sign pricing agreement • Publication of pricing announcement	• Listing • Closing on T+2/T+3 basis • Stabiliza-tion activities undertaken by banks

4. SEC-REGISTERED INITIAL PUBLIC OFFERINGS

4.1	Introduction	34
4.2	Foreign Private Issuer	34
4.3	Emerging Growth Company	34
4.4	SEC Registration: Key Differences	34
4.6	Liability	35
4.7	Post-IPO Obligations	36

4.1 Introduction

A number of German and European companies have made their IPOs on a U.S. stock exchange. U.S. IPOs might make sense for issuers whose peer group, potential investor base or research analysts are centered in the United States. A U.S. listing allows these issuers to achieve higher valuations.

U.S. IPOs must be registered with the U.S. Securities and Exchange Commission (SEC). This drives a process that is different, lengthier and typically more costly than a European listing. Post-IPO obligations are also more onerous in the United States than in Europe.

The following paragraphs provide only a high-level overview of the SEC registration process. Legal counsel should be involved from the outset of a contemplated U.S. IPO.

4.2 Foreign Private Issuer

Incorporation of a U.S. entity is not required for a U.S. IPO. Foreign-incorporated entities can list as "foreign private issuers" (FPI). FPIs benefit from less onerous reporting and legal requirements compared to U.S. companies.

To qualify as an FPI, the following must not be true:

- More than 50% of the issuer's outstanding voting securities are owned by U.S. residents; or
- either (i) the majority of the issuer's officers or directors are U.S. citizens or residents; or (ii) more than 50% of the assets are located in the U.S.; or (iii) the business is administered principally in the U.S.

4.3 Emerging Growth Company

The JOBS Act created a new category of issuer, an emerging growth company (EGC). An issuer's qualification as an EGC provides a transition period, or on-ramp, from private to public company, with significant benefits in a U.S. IPO.

To qualify as an EGC, an issuer must have less than $1.235 billion in total annual gross revenues in its last fiscal year. After the initial determination of EGC stratus, the ramp-up period lasts up to five years from the IPO pricing date until the issuer (i) earns more than $1.235 billion in total annual gross revenues; (ii) qualifies as a "large accelerated filer" with at least $700 million public equity float; or (iii) issues more than $1 billion of non-convertible debt securities in any 3-year period.

EGC status allows issuers to:

- Avoid auditor attestation on internal controls during a transition period;
- Gauge interest for an IPO ("test the waters" or "pilot fish") with qualified institutional buyers and institutional accredited investors early in the process;
- File the IPO registration statement confidentially with the SEC;
- Include in the IPO prospectus only two years, as opposed to three years, of audited financial disclosure; and
- Benefit from relaxed reporting in post-IPO SEC filings.

4.4 SEC Registration: Key Differences

The following discussion highlights the most salient differences between a German/European and a U.S. IPO process.

4.4.1. Timing for Registration and Approval

In the U.S., a minimum of three months from first filing of the registration statement (which is equivalent to a European prospectus) is required for SEC approval. In practice, four to six months to complete the registration process is more likely. This compares to an average of 8 weeks in Germany for prospectus approval.

4.4.2. Financial Statements

Compilation of required financial statements is typically the most difficult challenge for a U.S. registered IPO and significantly affects the IPO timetable. All required and complete financial statements must be included in the first prospectus filing with the SEC. Issuers should consult with their auditor's U.S. specialist team early on in the IPO process to ensure availability of SEC-compliant financial statements. The SEC's financial disclosure requirements are very technical.

FPIs may prepare consolidated financial statements using IFRS as issued by the International Accounting Standards Board (IASB). In this case, reconciliation to U.S. GAAP is not required. Audits must be conducted in accordance with

standards of the U.S. Public Company Accounting Oversight Board.

Audited consolidated financial statements generally must cover the issuer's last three fiscal years. However, first–time adopters of U.S. GAAP or IFRS as adopted by the IASB as well as EGCs under the JOBS Act are eligible to use only two full fiscal years of financial statements. Depending on the IPO timing, the issuer must also file consolidated interim financial statements.

4.4.3. Disclosure Requirements

Prospectus disclosure requirements are roughly equivalent in scope for a German/European and a U.S. IPO. Certain technical details differ, though these are not material.

In the U.S., there is more emphasis on certain disclosure parts of the registration statement, such as the "Operating and Financial Review" chapter, which tends to include more explanations than in Europe.

The SEC requires that the issuer's material contracts (in English) be filed with the registration statement. The SEC has adopted rules that permit issuers to file redacted material contracts without applying for confidential treatment of the redacted information, provided that the redacted information is not material and would be competitively harmful if publicly disclosed. The SEC Staff may supplementally request an unredacted copy of the contract, and may also subsequently request a materiality and competitive harm analysis to substantiate the redactions.

SEC review is more extensive than BaFin review. The SEC's comments are of a substantive as well as technical nature. The SEC often focuses on financial disclosures and risk factors and asks probing questions aimed at promoting transparency.

4.4.4. Corporate Governance

NYSE and Nasdaq-listed companies must satisfy certain corporate governance standards. With some exceptions, FPIs may follow home-country practices as long as they disclose any significant differences.

The most notable exception is the requirement relating to the composition and independence of audit committees. Audit committees of U.S.-listed companies must consist entirely of independent directors. The audit committee of a U.S.-listed German issuer may include an employee representative who is not an executive officer. In addition, a minimum of three audit committee members must have a basic understanding of financial statements with one member having "financial management expertise."

4.4.5. Confidentiality

FPIs that are (i) registering with the SEC for the first time; (ii) qualify as an EGC under the JOBS Act; or (iii) already listed on a non-US stock exchange or are concurrently listing on a non-US stock exchange may submit their IPO filings with the SEC on a confidential basis. A foreign private issuer may continue to confidentially submit the first draft of a registration statement for 12 months following the effective date of the initial registration statement and the filings remain confidential until the launch of the IPO. Thereafter, all documents related to the filing (including the SEC's comments and issuer's responses to comments) become publicly available through the SEC's electronic database (EDGAR).

4.5 Liability

A U.S. IPO exposes the issuer and other IPO participants to liability (see Chapter 16 "*Liability in Securities Offerings*").

This includes civil liability through private litigation or SEC enforcement actions. Egregious violations of U.S. securities laws may also result in criminal liability.

Issuers in a U.S. IPO face liability risk primarily from misleading prospectus disclosure, *i.e.*, where the registration statement contains an untrue statement of a material fact or omits to state a material fact. This liability attaches, among others, to persons who sign the registration statement (including the issuer and members of management) and members of the issuer's board of directors. The issuer is strictly liable. Defendants other than the issuer have certain defenses, including a due diligence defense. To benefit from a due diligence defense, the defendant must show that, after reasonable investigation, it had reasonable grounds to believe that the prospectus information was accurate and complete.

Liability for misleading disclosure can also arise from communications other than the prospectus, such as oral statements and ancillary offering materials.

Persons who do not directly participate in a U.S. IPO but control a participant (*e.g.*, significant shareholders) also face potential liability exposure. The analysis of control is fact-specific.

Generally, members of an issuer's board of directors and controlling shareholders should familiarize themselves with the offering disclosure to mitigate liability. Certain defenses are also available to control persons.

4.6 Post-IPO Obligations

Following a U.S. IPO, an FPI must make ongoing filings with the SEC.

An FPI must file annual reports using the SEC's form, which prescribes detailed disclosure requirements. The issuer must also submit to the SEC, as current reports, material information that the issuer makes available in its home country/listing jurisdiction or distributes to its security holders.

Other U.S. securities law provisions to which an FPI becomes subject following a U.S. IPO include the following requirements, among others:

- An assessment of the issuer's internal control over financial reporting by the issuer's management and an auditor's attestation report on such assessment must be made annually. This obligation begins with the IPO issuer's second annual report. Compliance with this undertaking can pose significant challenges to newly created public companies and preparations should begin early. EGCs are exempt from this requirement during the on-ramp transitional period.
- Issuers must also maintain various disclosure controls and procedures. These controls and other procedures are designed to ensure that information that must be publicly disclosed is timely reported and communicated to the issuer's management. Effectiveness of disclosure controls and procedures must be evaluated annually.
- Certifications by the issuer's CEO and CFO must be prepared and included in the issuer's annual reports.

5. DUAL TRACK PROCESSES

5.1 Introduction 38

5.2 Formal Dual Track Process 40

5.3 Synergies and Issues in a Dual Track Process 40

5.1 Introduction

Dual track processes involve M&A negotiations with potential buyers of a business (M&A track) in parallel to an IPO process (IPO track). Private equity exits almost always involve dual track processes in order to maximize transaction security and return on investment. In contrast, IPOs of start-up companies, which are typically founder-owned, involve dual tracks to a lesser extent.

There are two types of dual track processes, formal or "hard" dual tracks and informal or "soft" dual tracks.

5.1.1. Hard Dual Tracks

In hard dual track processes, potential M&A buyers are contacted proactively and a formal auction process is prepared at the outset. In a formal auction process, the timetable is coordinated and aligned with the IPO track because it is generally constrained by the IPO process and market windows.

In hard dual track processes, one or more of the IPO banks typically also advises shareholders on the M&A track. Alternatively, separate advisors can be hired for the M&A process.

5.1.2. Soft Dual Tracks

In soft dual track processes, potential M&A buyers are not contacted proactively. A vendor due diligence report or an information package is prepared to enable a quick initial assessment of the M&A opportunity in case of unsolicited inquiries or bids.

"Hybrid" forms between soft and hard dual tracks include proactively approaching potential M&A buyers without introducing a formal auction process.

5.1.3. Advantages and Disadvantages

Dual-tracks offer a variety of advantages, including:

- greater transaction certainty and more pressure on the M&A track due to increased competition from the IPO track;
- flexibility to pursue the M&A track in case of unfavourable market conditions for an IPO;
- stimulation of potential buyer interest where the IPO becomes public knowledge; and
- the potential to engage in a hybrid disposal solution, *e.g.*, with a cornerstone IPO investor from the M&A track (a cornerstone IPO investor is an investor which commits to purchase a significant number of shares in the IPO, thus enhancing the success of the IPO).

Dual-tracks also face disadvantages, including:

- substantially higher resource dedication from the company's management and employees as well as advisors to run parallel transactions;
- higher costs, even though there are various synergies between the tracks;
- IPO banks may be less incentivized where it appears that the M&A track is the preferred solution;
- risk of a more drawn-out process due to strain on resources and lack of focus; and
- significantly reduced benefits if buyers perceive the IPO track as not viable (*e.g.*, in a bad market environment).

The following table provides an overview of the pros and cons of an M&A process compared to an IPO:

M&A		**IPO**	
Advantages	**Disadvantages**	**Advantages**	**Disadvantages**
• M&A process can quickly lead to an agreement in principle and signing of purchase agreement • Sellers tend to be more familiar with an M&A process than an IPO process • Possibly higher valuation for certain types of businesses • 100% exit for shareholders vs. only partial initial exit in an IPO • Room for negotiation between seller and buyer of various specific considerations and issues • Limited management liability • Lower costs and usually lower advisor/bank fees	• Contingent liabilities post completion due to representations, covenants and other buy-side protections • Many sales include earnouts (deferred consideration) and escrow concepts for part of the price • Key management may be less motivated to stay post completion, which may affect price • Possible need for forecasts, such as detailed business plans • Due diligence issues (e.g., need for change-of-control or other consents) may be deal breakers • Completion (closing) might take place many months after signing of purchase agreement (and may fail due to, e.g., failure to obtain anti-trust approvals)	• Depending on the business, can maximize consideration received over time, especially if company performs well post IPO • Enhanced profile and brand recognition for public company • Ability to raise future financing from public markets • Ability to use listed shares as consideration for future M&A activity • Attraction and retention of key employees via share options and management independence • Founders and management can continue to hold significant shares post IPO • For certain businesses, especially growth companies, M&A buyers are scarce or do not see IPO valuations as reasonable	• Need for intention to float announcement and provision of research reports to investors • Success can be affected by market conditions • More time-consuming • Shareholders achieve only partial disposal on IPO • Shareholders' remaining shares are locked-up post IPO for at least 6 months • More public process than M&A • Difficulty of dealing with business sensitive disclosures • Statutory liability for prospectus contents and possibility of shareholder law suits in failed IPOs • Post-IPO continuing obligations (public announcements, shareholder approvals for material transactions)

5.2 Formal Dual Track Process

In a hard dual track, the IPO banks are aware of the M&A track. One or more of the IPO banks are typically hired to prepare the formal auction process and drive an integrated timetable for the M&A and IPO processes.

The process starts with in-depth work by the advisors, together with the company, to create a process timeline and provide a valuation as well as a discussion on materials to be provided to potential buyers as part of the initial M&A contact.

Following the formal launch of the auction process, bidders receive the information package and can perform initial due diligence on the company and provide indicative bids.

Following the first round of bids, there is typically a down-selection to the best and most serious bidders with whom negotiations start in parallel to the IPO process. Bidders complete a more in-depth due diligence on the company and prepare their final, binding bids. At the point final binding bids have been provided, the IPO track should generally have advanced enough for a good indication of IPO pricing. At this point, based on capital markets conditions, the issuer typically decides whether to pursue the M&A process further or concentrate on the IPO track.

The IPO process is typically not stopped until there is an actual agreement on heads of terms or, in most cases, a signed share or asset purchase agreement with a bidder.

5.3 Synergies and Issues in a Dual Track Process

5.3.1. Relationship with IPO banks

Banks advising on IPOs typically do not receive any compensation if the IPO is not successfully concluded. While issuers may pay some engagement fees to initiate an IPO process, bank fees in an IPO consist principally of management, selling and underwriting fees that are awarded based on the volume of shares sold in the IPO.

Global coordinators in IPOs increasingly seek break-up fees in case the IPO is abandoned and an M&A sale is completed within a certain period following the abandoning of the IPO. IPO break-up fees can be staggered based on milestones achieved within the IPO process, such as completion of an analyst presentation, filing of the prospectus with the regulator or publication of an intention to float announcement.

5.3.2. Vendor due diligence

Vendor due diligence reports are packaged legal and business reports prepared at the outset of an M&A process in order to allow potential buyers to make an assessment of the business.

Preparation of vendor due diligence reports can involve substantial costs and time from the company's management and other employees. Such reports are not required in all processes. The expense and effort to prepare a vendor due diligence report may be avoided, in particular in soft dual tracks where only limited interest from potential buyers is expected.

In the IPO track, a vendor due diligence report can be leveraged as a basis for prospectus drafting and as part of the due diligence process.

5.3.3. Constraints for management

Significant efforts from the company's management may be necessary to provide potential M&A buyers with required information. As part of their due diligence, potential buyers request documents and seek answers to in-depth questions about the business, ranging from strategy to other business plans and legal topics. Additionally, bidders who submit initial indicative bids require meetings with management and specialist employees. These meetings can require significant preparation, strain the company's resources and divert attention from the IPO timetable, in particular in hard dual track processes.

As a result, in a hard dual track, the IPO and M&A timetables need to be aligned to avoid bottlenecks and delays.

In soft dual tracks, unexpected significant M&A activity from unsolicited bidders can also create IPO track bottlenecks and put extra constraints on management. Therefore, while soft dual tracks are generally initially less costly and demanding in terms of company resources, should a serious M&A opportunity arise, this can have an impact on the IPO track. However, as a general matter, soft dual tracks are easier to handle for the company's management.

5.3.4. Cut off dates for the IPO vs. the M&A track

As a legal matter, the point of no return for an IPO is the pricing and allocation date. On this day, the pricing agreement is signed and confirmations of sales of shares are provided to investors. However, because of the publicity surrounding an intention to float announcement or an IPO launch, practically speaking, the publication of an intention to float is viewed as the IPO point of no return.

Within an M&A track, reaching certain stages in negotiations may cause stakeholders to put the IPO track on hold or delay it. However, in most cases, in order to put pressure on the M&A track, the IPO track will continue along the agreed timetable as long as no purchase agreement or merger agreement is signed. After signing such agreement, even if the closing of the M&A transaction is outstanding and conditions precedent or regulatory approvals could cause the sale to fail, the IPO track is typically put on indefinite hold to avoid further costs.

The following graphic shows an indicative timeline of a dual track process and its IPO and M&A components:

Month 1	Month 2	Month 3	Month 4	Month 5	Month 6

	6 weeks	**6 weeks**	**6 weeks**	**4 weeks**
IPO	• Commence preparatory work for IPO (drafting of prospectus, corporate governance, etc.) • Prospectus drafting in working group/equity story development with banks • Any required pre-IPO reorganization	• First-time filing of prospectus with BaFin/ regulator (towards the end of this period) • Begin pre-sounding with investors based on preliminary equity story • Draft analyst presentation	• Analyst presentation, thereafter analysts draft their research reports • Pilot fishing meetings scheduled for after intention to float announcement • Finalization of prospectus and further BaFin/ regulator filings	• Intention to float announcement and research reports sent to investors • Approval of prospectus by BaFin/regulator and formal marketing of the IPO (roadshow) • After roadshow, pricing and settlement and listing of shares
Dual track	• Confirmation of IPO/ auction dual track timetable • In-depth valuation work • Prepare vendor due diligence reports	• IPO vs. trade sale: comparison of relative prices, decision on exit strategy and communication to the market	• IPO vs. trade sale: updated comparison of relative prices, decision on exit strategy and communication to the market	• Finalization of chosen track
M&A	• Preparatory work for the sale process	• Contact with potential buyers	• Due diligence by potential buyers • Binding offers from potential buyers	• Finalization of the sale

A full dual track process will usually take at least five to six months (the time frame can potentially be longer). Final decision of IPO or M&A in most cases is just before the intention to float announcement in the IPO

6. SPIN-OFFS

6.1 Spin-Offs 44

6.2 Spin-off vs. Equity Carve-Out 44

6.3 Siemens Osram and other spin-offs in Germany 45

6.4 Tax treatment of the spun-off shares 45

6.5 Corporate Law Steps 46

6.6 Spin-Off Marketing and Prospectus 48

6.1 Spin-Offs

Capital markets can be used to spin-off parts of a larger business. The economic rationale to divest a business unit usually arises in an effort to refocus on a core business while spinning off or selling non-core lines. With its own management, strategy and structures, the spun-off entity should be able to operate its business more effectively, thus improving shareholder value.

There are two principal procedures for spin-offs via capital market transactions:

- **Equity carve-outs**: involve a standard IPO or dual track process, in which the "parent group" is the selling shareholder and the shares of the spun-off entity are sold to various investors, including new investors and, potentially, existing shareholders of the parent company. An equity carve-out can include the raising of new equity through a capital increase within the IPO.
- **Spin-offs**: involve a share spin-off to existing shareholders of the parent company without the sale of any shares to new investors and without raising new capital. Shares of the spun-off entity are given to the parent's existing shareholders free of charge.

6.2 Spin-off vs. Equity Carve-Out

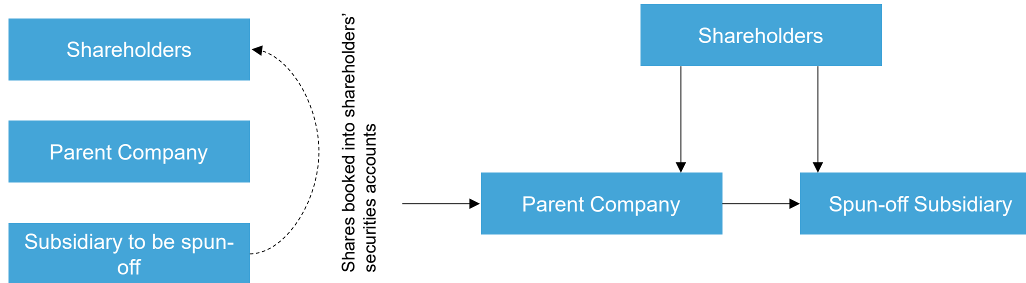
Compared to equity carve-outs, spin-offs require several additional corporate law steps. This can create a more costly and time-consuming process compared to an IPO or dual track process. Additionally, spin-offs do not provide for the raising of new equity by the spun-off company or proceeds for the parent company. In some cases, the parent company and the spun-off entity put in place bilateral funding instruments, such as convertible bonds, to implement a desired capital structure of the spun-off entity. Furthermore, a spin-off does not raise any funds for the parent company through a sale of shares.

A benefit of a spin-off is its independence from market fluctuations. Shares of the spun-off company are booked directly to shareholders' securities accounts without the shareholders making an investment decision. The decision to approve the spin-off is made via an earlier shareholders' meeting. As a result, even during periods of volatility in which an IPO might not be possible, a spin-off can go forward as planned.

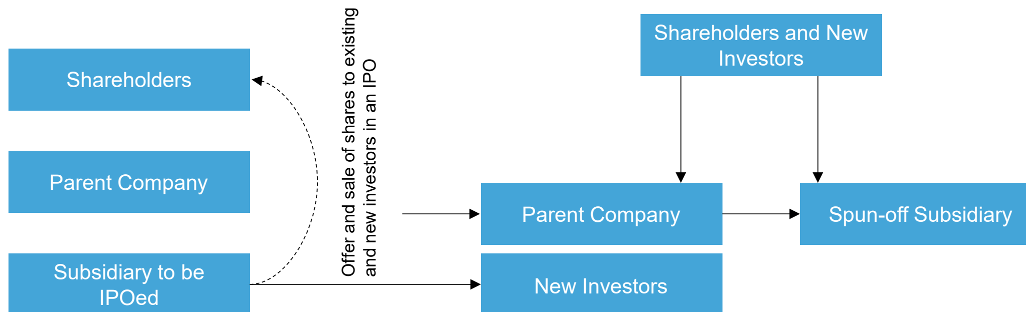
Therefore, spin-offs significantly enhance transaction security and provide a way to exit immediately up to 100% of the business. The downsides of spin-offs are a more complex process compared to equity carve-outs and the absence of an opportunity to raise new equity for the parent or the spun-off entity. In addition, especially larger spin-offs involve similar marketing activities and process consideration (including IPO-type prospectus disclosure) in order to avoid "sell-offs" by shareholders immediately after the spin-off.

The following charts illustrate a spin-off and an equity carve-out:

Spin-off: No investment decision by shareholders, no new shareholders, the parent company's shareholders receive all or part of the shares of the spun-off subsidiary



Equity Carve-out with Classical IPO: Investment decision by investors including new investors; investors in the IPO usually buy part of the shares while the parent company also continues as a shareholder



6.3 Siemens Energy and other spin-offs in Germany

Several spin-offs have been completed in recent years.

Recent notable spinoff transactions in Germany include the separation of Siemens Energy from Siemens AG, Vantage Towers from Vodafone and Pentixapharm from Eckert & Ziegler.

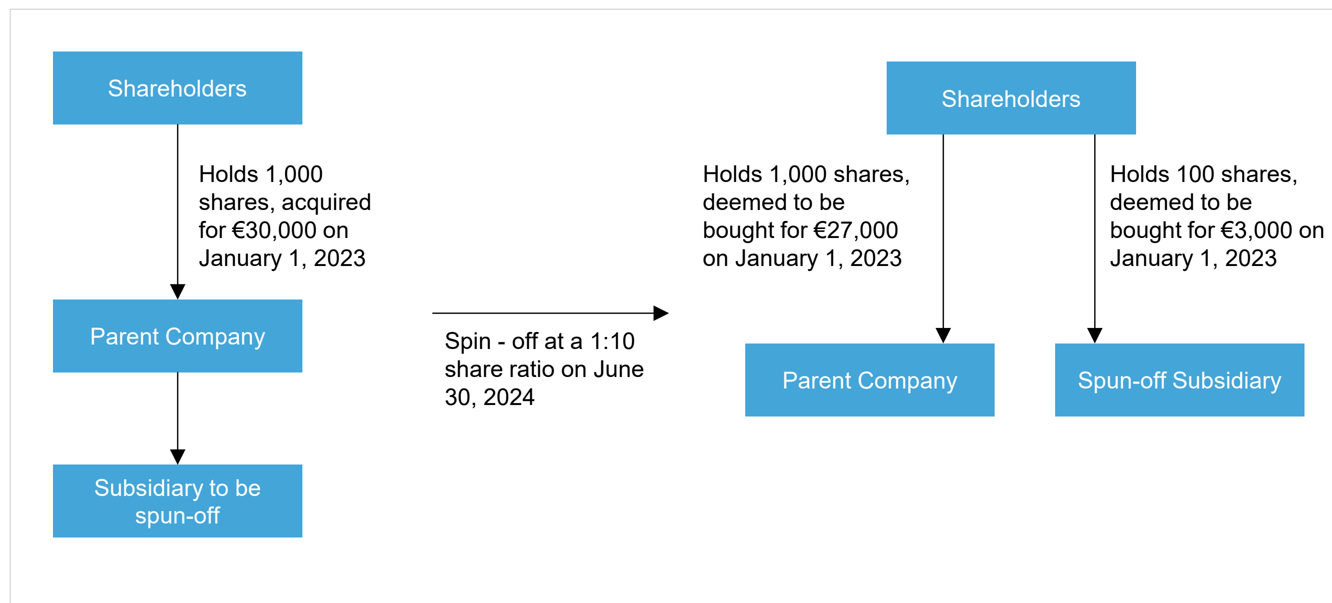
Other spin-offs include the spin-off of Daimler Truck from Daimler AG, Vitesco Technologies from Continental AG, Lanxess from Bayer AG and Covestro from Bayer AG.

6.4 Tax treatment of the spun-off shares

A spin-off could be highly unattractive for a company's shareholders if it leads to adverse tax consequences, such as capital gains or the loss of exemptions from speculative investment periods. Certain spin-offs, such as Siemens-Osram, do not trigger a taxable event for German shareholders or shareholders in certain other European jurisdictions (however, they can be viewed as a taxable event in, *e.g.*, the U.S.) because the shares received are principally treated as the shares exchanged for purposes of the spin-off. For example, the initial purchase price of the Parent Company shares for any Parent Company shareholder can

be split in a 10 - to-1 ratio between the Parent Company shares and the Spun-off Subsidiary shares received in the spin-off. In addition, under certain conditions, the distribution of Spun-off Subsidiary shares to Parent Company shareholders is not viewed as a taxable dividend. The Spun-off Subsidiary shares' purchase date for capital gains tax purposes is deemed to be the same date on which a shareholder purchased its Parent Company shares.

The following graphic illustrates a spin-off example for an individual shareholder:



6.5 Corporate Law Steps

6.5.1. Legal Entities and Asset Transfers

Spin-offs involve a significant number of corporate steps. If the to-be-spun-off business is not incorporated as a separate legal entity, such entity needs to be created and receive designated assets.

Designated entities that are part of sister companies within the overall parent group must also be transferred to the entity that shall be spun off.

6.5.2. Spin-off Report (*Spaltungsbericht*)

Most notably, a spin-off requires a spin-off report, which is a comprehensive, legally required corporate law report setting out, among other things, the following:

- Reasons for the spin-off;
- Description of the spun-off group, including which material legal contracts and business units will be spun-off;
- Description of the post-spin-off relationship between the parent group and the spun-off group;
- Details of the plan, timeline and steps to be taken until completion of the spin-off;

- Accounting and tax consequences for shareholders, the parent group and the spun-off group;
- Description of corporate governance and business structure of the spun-off group;
- Description of the parent group and effects of the spin-off on the parent group; and
- Description of the spin-off contract between the spun-off entity and the parent group.

The spin-off report must include certain draft documents, such as the spin-off contract between the parent group and the spun-off entity and the articles of association of the spun-off entity.

Principally because the report is furnished to shareholders before a vote on the spin-off in a shareholders' meeting, the process for a spin-off requires longer preparation than an equity carve-out. Tax and accounting analysis, corporate governance matters, details of timing and corporate steps need to be completed by the time of publication of the spin-off report, well before the actual spin-off.

For example, the Siemens Energy spin-off report was published in May 2020, while the spin-off became effective only in September 2020.

6.5.3. Spin-off Audit Report (*Spaltungsprüfbericht*)

A spin-off requires a special audit report. This report is completed by an accounting firm, which does not have to be the auditor of the parent group or the spun-off group.

The spin-off audit report is a detailed review of the planned spin-off, the spin-off contract between the parent group and the spun-off group and other legal and accounting considerations. Additionally, the spin-off audit report reviews whether the commercial conditions (*i.e.*, most principally the ratio of old shares to new shares of the spun-off entity) accurately reflect the valuation of the parent group and the spun-off group.

6.5.4. Shareholder Approval

A spin-off requires shareholder approval. While an equity carve-out is often also put to shareholder vote (especially for substantial carve-outs), depending on the situation, this is not strictly necessary. Should management consider a shareholders' meeting approval problematic, an equity carve-out (usually as part of a dual track process) is the preferred choice unless market conditions for an IPO are unfavorable.

6.5.5. Financial Statements

Preparation of financial statements for a spun-off entity can be costly and time consuming if the spun-off entity did not operate as a separate legal unit or if it included sister companies. Preparation of the financial statements for three financial years can delay the spin-off and should be undertaken early in the process.

6.5.6. Corporate Governance and Organization

A spin-off or equity carve-out requires significant considerations and efforts with respect to corporate governance and business organizational structure of the new entity.

This can include creation of a separate works' council, supervisory board, legal, investor relations, accounting and controlling functions.

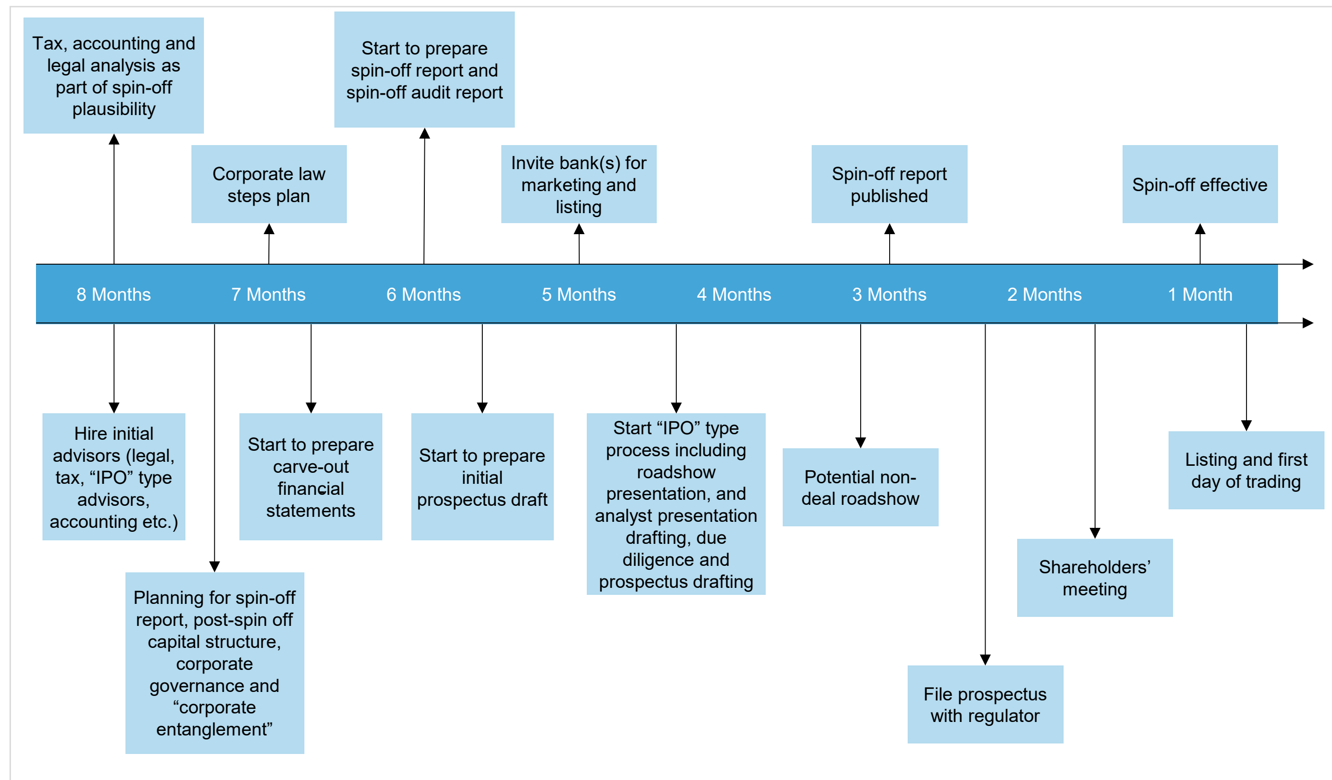
6.5.7. Contractual Arrangements between the Parent and the Spun-off Entity

Typical pre spin-off relationships between the parent and the spun-off entity include cash pooling contracts, internal financing arrangements and domination and profit transfer agreements. These contracts must be terminated as part of a spin-off preparation.

A new set of contracts is typically put in place, including a spin-off contract (*Abspaltungsvertrag*), setting out the relationship between the parent and the spun-off entity. This can cover services that the parent will continue to render to the spun-off entity and other considerations.

Depending on the desired capital structure of the spun-off entity, arrangements may be required to allow the spun-off entity to assume existing debt (*e.g.*, obtaining waivers from existing lenders) or take on new instruments, such as portable internal bonds (between the parent and the spun-off entity).

The following graphic illustrates an indicative timetable for a spin-off:



6.6 Spin-Off Marketing and Prospectus

6.6.1. Pre-Spin-off Preparation

Due to the more extensive preparations and complexities set out above, the spin-off preparation phase must be commenced well in advance of the more traditional "IPO"-type tasks.

These preparations can require up to 6 months before starting the actual spin-off process involving an advising bank and potential marketing and prospectus efforts

6.6.2. Marketing

Because shareholders of the parent company receive shares of the spun-off entity without making an investment decision, a spin-off could theoretically not involve any marketing activity or investor meetings. In practice, however, larger spin-off processes are, to a large extent, structured similarly to IPOs in terms of marketing. This is due to the desire that shareholders of the parent continue to hold shares of the spun-off entity. To achieve this, the marketing tools used in IPOs (early investor meetings, roadshows, analyst research reports and an IPO-style prospectus) are also prepared in

larger spin-off. For more information on the IPO process, see Chapter 3 "*Initial Public Offerings (IPOs) of Shares*."

This seeks to avoid potential large-scale "share flow-backs," *i.e.*, shareholders seeking to sell their shares of the spun-off entity shortly after a spin-off because, without the benefit of sufficient information, they perceive such shares as risky.

Additionally, insufficient information flow in a spin-off can create investor relations problems for the parent.

6.6.3. Prospectus

The Prospectus Regulation and the German Prospectus Act allow for a spin-off and listing of shares of a subsidiary from a parent without an approved prospectus if the shares are provided solely to the parent's shareholders. A document for listing and spin-off purposes can include more limited disclosure than an IPO-style prospectus.

In practice, in larger spin-offs due to the above-described marketing considerations, in many instances, especially for larger companies, a complete IPO-style prospectus is provided to investors.

7. CAPITAL INCREASES

7.1 Introduction 51

7.2 Equity Capital Raising of Private Start-up Companies 51

7.3 Equity Capital Raising Post-IPO 51

7.4 Rights Offering Process 54

7.5 Rights Offering Economics 55

7.6 "10%" Capital Increases Against Cash Contribution 58

7.7 Capital Increases in Kind 58

7.1 Introduction

There are a variety of ways for a company to raise equity capital outside of an IPO. The selected method will depend largely on whether the company is private or public.

7.2 Equity Capital Raising of Private Start-up Companies

Start-up companies initially raise equity capital through private arrangements, using personal funds of founders, friends and family, angel investors, private or government incubators, grants, venture capital investors, crowd funding and other sources.

With the exception of crowd funding, corporate and securities laws generally play an insignificant role in such equity capital raisings for start-ups and small companies.

Early-stage funding agreements focus on provisions that protect investors in future funding rounds (anti-dilution) and provide tag-along and drag-along rights if shareholders should sell their equity holdings.

Securities law aspects of pre-IPO private investment agreements may include agreements on participation in a future IPO, but are often limited in applicability.

Granting options or shares to employees in such situations generally does not raise securities law concerns in Germany and Europe.

Avoiding application of securities laws in start-up crowd funding is possible if there is no offering of securities (such as shares) to the public. Instead, companies offer products or services that they aim to develop in the future. Securities laws generally are not concerned with fundraising through donations or pre-payments for the delivery of future products and services. Securities laws become relevant only if a crowd funding drive is structured as an offering of securities (bonds, shares or similar instruments).

Common capital markets or securities instruments used by private companies are convertible bonds, convertible loans and warrants, as well as straight share issuances to investors. Offering these instruments triggers securities law requirements and liability. For more information on convertible instruments, see Chapter 9 "*Convertible Bonds*."

7.3 Equity Capital Raising Post-IPO

Following an IPO, a German issuer's flexibility to raise equity capital is constrained by a variety of legal and technical factors.

7.3.1. Corporate Law Constraints

The German Stock Corporation Act (which applies to AGs and partially also to SEs) provides anti-dilution protection to existing shareholders in new equity raises. Capital increases (*i.e.*, the creation of new shares) require shareholder approval.

In addition, shareholders generally must receive subscription rights which entitle them to acquire new shares although there are commonly used exceptions such as cash capital raisings up to 20% of the share capital without subscription rights.

As a result, large post-IPO equity capital raises for German companies involve a more complex process which requires obtaining shareholder authorization and making a public rights offering. The process is, to a great extent, similar to an IPO.

Non-German companies with shares listed in Germany continue to be subject to the corporate law requirements of their jurisdiction of incorporation. Several jurisdictions, such as Luxembourg or the Netherlands, have less restrictive corporate laws.

7.3.2. Shareholder Authorization

Under the German Stock Corporation Act, creation of new shares requires a shareholder resolution in a shareholders' meeting. While the law otherwise requires a super majority of ¾ of the share capital present at the shareholders' meeting to approve such resolution, most articles of association of public companies reduce this requirement to a simple majority.

Convening a shareholder meeting requires fairly extensive preparation. All required documents (such as the shareholder agenda) must be finalized and there must be at least a 30-day period between the announcement to convene a shareholders' meeting and the actual meeting.

The German Stock Corporation Act provides two alternatives to a shareholder resolution in a capital increase:

- **Authorized capital** (*genehmigtes Kapital*): Shareholders can authorize management for a period of up to 5 years to issue new shares amounting up to 50% of the existing share capital. Authorized capital is one of the principal authorizations used for a rights offering, as it allows management to react to favorable market conditions without having to convene a shareholders' meeting.
- **Contingent capital** (*bedingtes Kapital*): Shareholders can authorize contingent capital that management may use for three distinct situations: (i) creation of new shares for conversions of convertible bonds to shares, (ii) creation of new shares as part of business combinations, and (iii) provision of rights to receive new shares to employees and management.

7.3.3. Subscription Rights

The German Stock Corporation Act generally requires that a shareholder must receive subscription rights for new shares in proportion to such shareholder's existing shareholding.

A minimum period of 2 weeks must be provided for the exercise of subscription rights.

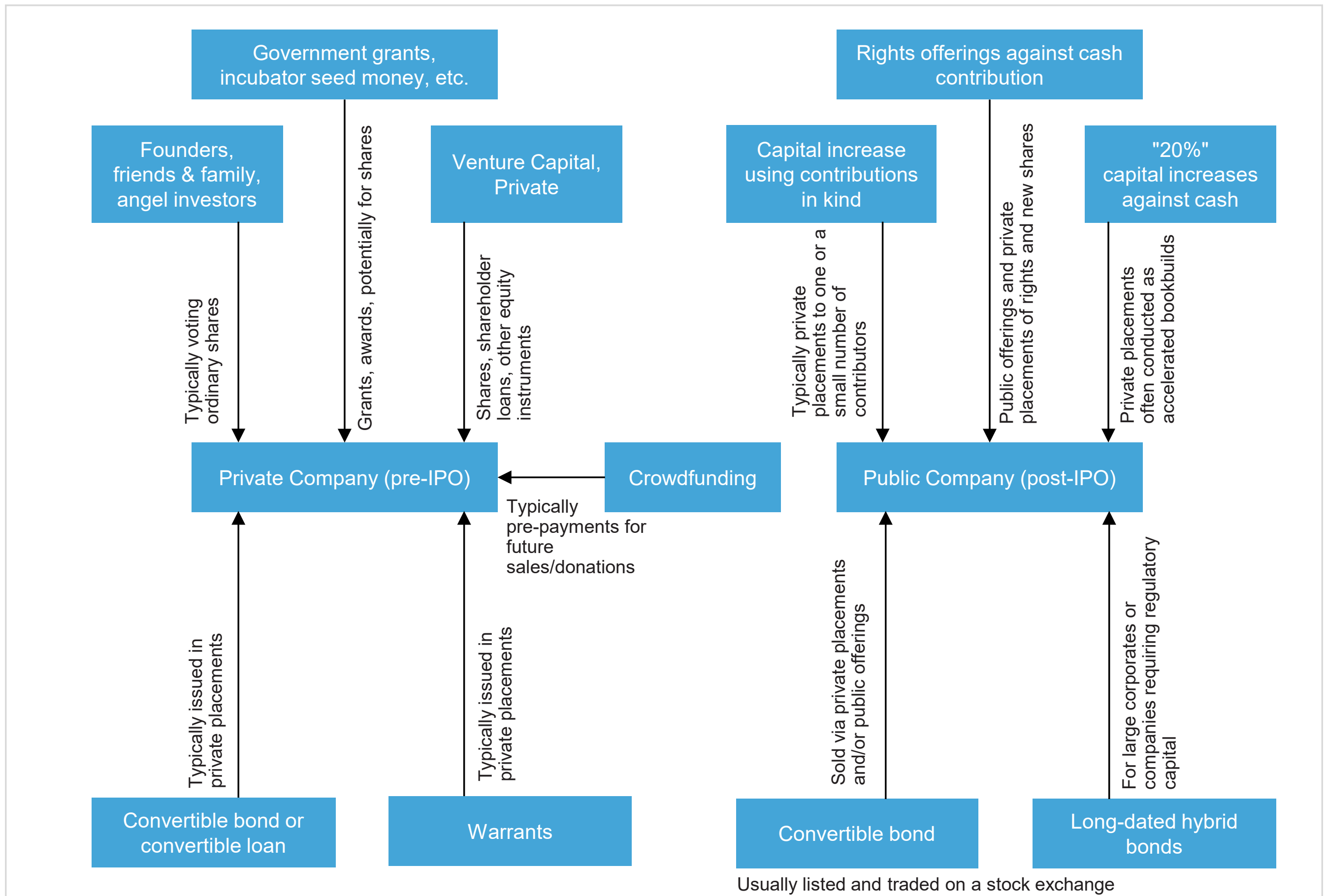
Shareholders can waive their individual subscription rights, sell the subscription rights to third parties or not exercise them.

The German Stock Corporation Act provides for the possibility to exclude shareholder subscription rights through a resolution of shareholders in the following circumstances:

- **20% capital increases**: Companies can raise up to 20% of their existing share capital against cash contributions without subscription rights as long as the price of the new shares is not significantly below the market price of the existing shares.
- **Previous resolution**: Subscription rights can generally be excluded in part or in whole through shareholder resolution. However, it is a generally accepted legal view that a complete exclusion of subscription rights requires a valid reason.

This reason does not exist for offerings of new shares against cash contributions where companies are able to conduct subscription rights offerings. A valid reason can be present, for example, in capital increases using contributions in kind (*Sachkapitalerhöhungen*).

The following graph illustrates the various options available to private and public companies to raise equity and equity-like capital outside of an IPO:



7.4 Rights Offering Process

A typical rights offering involves the creation of new shares against cash contributions from the company's existing shareholders and, to the extent that subscription rights are not exercised, potentially from new shareholders.

The subscription rights offering process for a public company is, to a great extent, similar to an IPO process. See Chapter 3 "*Initial Public Offerings (IPOs) of Shares*."

7.4.1. Prospectus

Because subscription rights and the resulting new shares are securities offered to the company's shareholders, a rights offering requires a prospectus approved by the relevant authority (BaFin for German companies).

There are special considerations for shareholders in jurisdictions other than the jurisdiction where the company's shares are listed, such as U.S. shareholders. An upfront analysis is required to determine whether and under what circumstances these shareholders can exercise their subscription rights.

A rights offering prospectus is similar in content to an IPO prospectus, however, a simplified disclosure regime is available under the Prospectus Regulation. The new EU Listing Act regime, which will apply from March 2026, will replace this simplified disclosure regime by introducing an "EU Follow-on prospectus".

The EU Follow-on prospectus will be limited to maximum 50 pages (excluding summary), require only one year of financial information and exclude the need for an Operating and Financial Review (OFR). However, it is likely that market practice will continue to require preparing a "full prospectus" to address liability considerations and/or other securities laws requirements.

An initial rights offering prospectus draft is prepared by the issuer's counsel based on the company's existing public disclosure, such as annual and interim reports.

7.4.2. Due Diligence

As in an IPO, a fully documented rights offering (i.e. where a prospectus is prepared) entails a due diligence process, including the review of documents and meetings with the issuer's management.

Because preparing and conducting due diligence is time consuming, this work stream should be prioritized in a rights offering process.

7.4.3. Bank involvement

Investment banks are typically engaged in rights offerings to facilitate contact with investors. This is also the case in discounted rights offerings where the majority of shares are usually taken up by existing shareholders or by purchasers of subscription rights.

The issuer and the mandated banks typically sign an engagement letter at the outset and later enter into an underwriting agreement. Except for various technical aspects, the underwriting agreement in a rights offering covers the same matters as in an IPO.

7.4.4. Research reports

Public companies with significant analyst coverage usually do not require deal-related research reports to market rights offerings.

In large rights offerings in which already-public companies issue a significant number of new shares, advising banks may involve analysts to prepare research reports similar to those prepared in an IPO. In addition, some public companies have listed shares, but a small free float or generally small market capitalization. In such cases, substantial subscription rights offerings are called "Re-IPOs" and usually include deal-related research reports.

7.4.5. Marketing

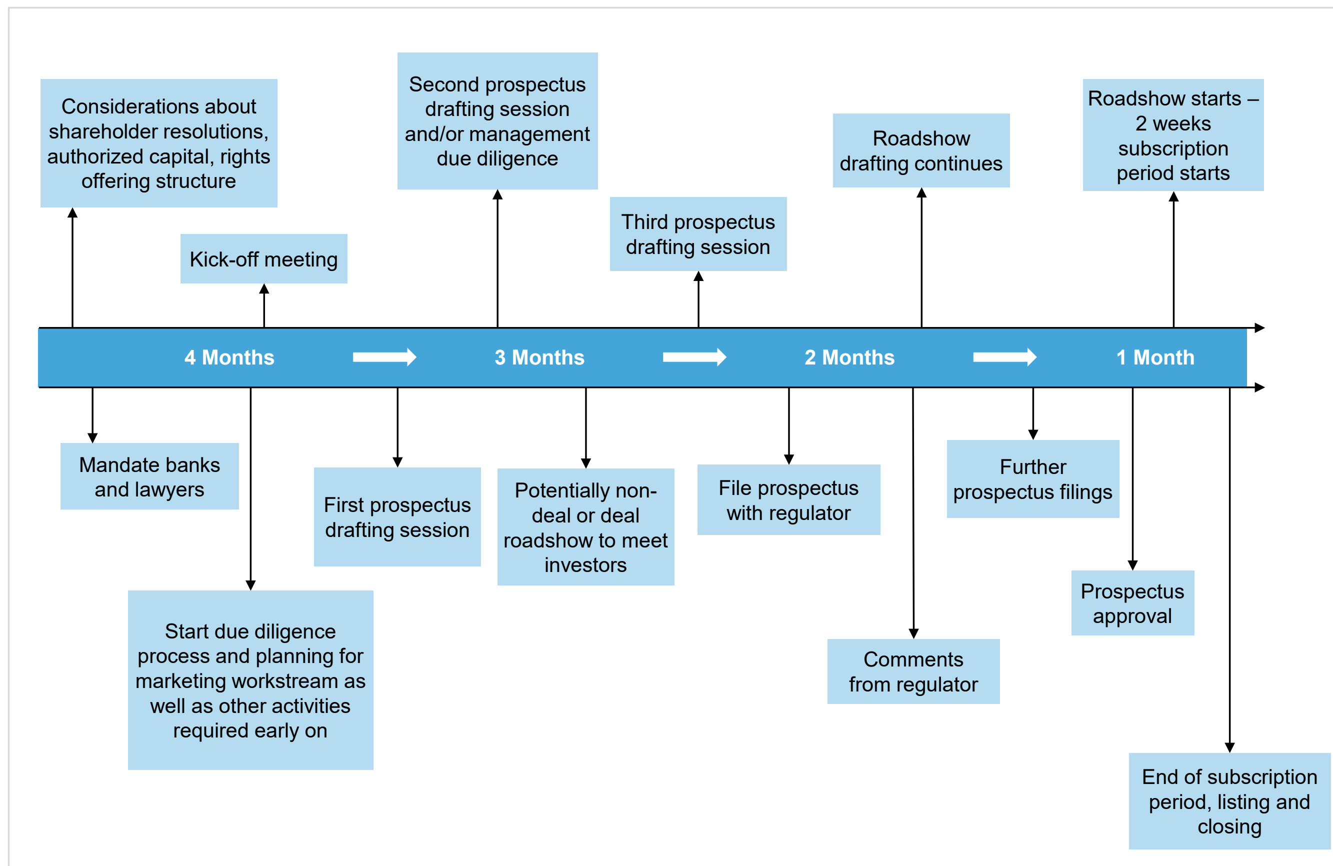
Public companies have an obligation to protect material non-public information. The intention to conduct a rights offering may be considered to constitute material non-public information. This triggers an obligation to prevent disclosure of the information pursuant to an internal exemption from publication of the information as an ad-hoc release (*Selbstbefreiung*).

Hence, investor meetings in the run-up to a rights offering are typically conducted as so-called "non-deal" roadshows. In these meetings, investors' interest in and views of the

company are discussed as a general matter without mentioning a possible rights offering.

Should a deal-related investor roadshow be planned before a rights offering, there are two ways to comply with legal disclosure requirements. Investor meetings are either restricted to only a few investors and these investors are "wall-crossed" through a non-disclosure agreement or, alternatively, the intention to conduct a rights offering and indicative terms of the offer are made public.

This reduces restrictions on investor communication. The following graphic shows an indicative rights offering timetable:



7.5 Rights Offering Economics

There are several options to structure a rights offering.

The feasibility of each option depends, to a large extent, on the issuer's shareholder structure. The two traditional rights offering mechanisms, which are used in most German subscription rights offerings, are the discounted fixed price rights offering and the "at market" rights offering.

7.5.1. Discounted fixed price rights offerings

In a discounted fixed price rights offering, the subscription price per share is set at the beginning of the subscription period.

To incentivize existing shareholders to exercise subscription rights, the subscription price is set typically at least 5% below the market price of the shares. In times of high market volatility, the discount can be significantly higher. Should the market price of the shares fall significantly during the subscription period, this could result in a failed offering. This is because the subscription price cannot be changed during the subscription period unless the subscription period is extended by a full two weeks from the announcement of the change in subscription price.

In a successful discounted rights offering, typically 99% or more of the subscription rights are exercised. To achieve this success rate, subscription rights are typically also listed on a stock exchange to facilitate their trading. This allows shareholders who do not want to exercise their rights to monetize them through a sale.

Any remaining unsubscribed shares are sold in a so-called "rump offering," either via a private placement to new investors or to the underwriting banks, who buy these shares with an intention to sell them into the market.

7.5.2. "At-market" rights offerings

In an at-market rights offering, the subscription price is left open at the beginning of the subscription period and set based on the market price of the shares towards the end of the subscription period. German regulation requires the announcement of the market price three days prior to the end of the subscription offer. In order to minimize the market uncertainty for "at market" rights offerings, the setting of the subscription price is usually done on a Friday, which allows an end to the offer period on the following Monday.

7.5.3. Rights offerings with pre-placements and potential rump placements

To enhance the success of a rights offering, shares can be placed with investors in a private placement before the beginning of the subscription period. This alternative rights offering structure requires a significant number of existing shareholders or one large controlling shareholder who agree to waive their subscription rights before the rights offering.

The shares for which subscription rights have been waived can then be placed with new investors in a private pre-placement. The price that is achieved in the private pre-placement becomes the subscription price for the rights offering to shareholders who have not waived their subscription rights.

Similar to a discounted fixed price rights offering, any shares not sold in the pre-placement or subscribed by shareholders during the subscription period, are sold in a rump placement at the end of the subscription period.

A variant of this rights offering structure includes a so-called "claw back" element. In a claw back rights offering, 100% of the shares (or potentially slightly less) are sold in the pre-placement, with a portion of such shares being sold subject to a "claw back" provision. Those shares that are subscribed for during the subscription period by shareholders who have not waived their subscription rights can then be "clawed back" from investors who bought shares in the pre-placement.

The "claw back" variant only works for public companies with one or several shareholders holding a significant majority of the shares who waive their subscription rights. Alternatively or as a hybrid model, some existing major shareholders may provide a call option on some of their existing shares in order to limit the likelihood that any shares have to be clawed back from investors who bought in the pre-placement.

These alternative rights offering structures significantly reduce market uncertainty and the likelihood of a failed offering, and increase the rights offering price. However, they require large investors willing to partially or fully waive their subscription rights.

7.5.4. Anchor investor fixed orders

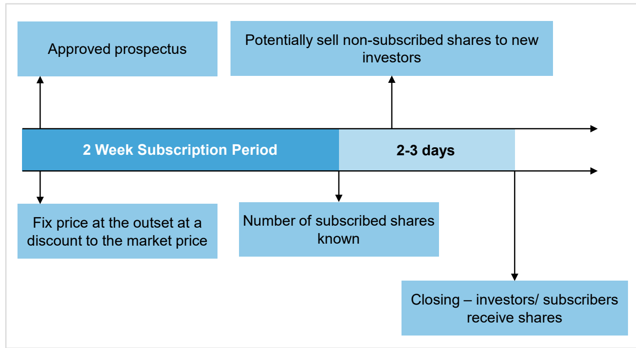
Before the commencement of the subscription period, a large shareholder or shareholders can agree to exercise their subscription rights in the rights offering.

A large investor can also offer to "back-stop" the offering, *i.e.*, agree to purchase all shares not subscribed by other shareholders.

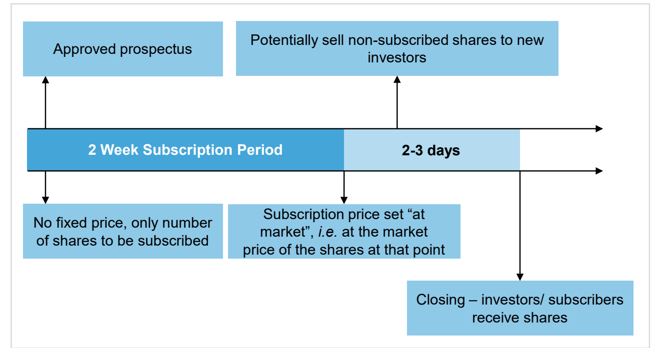
Such agreements increase the likelihood of a successful offering.

The following charts show the different rights offering structures: Fixed price discounted rights offering structures:

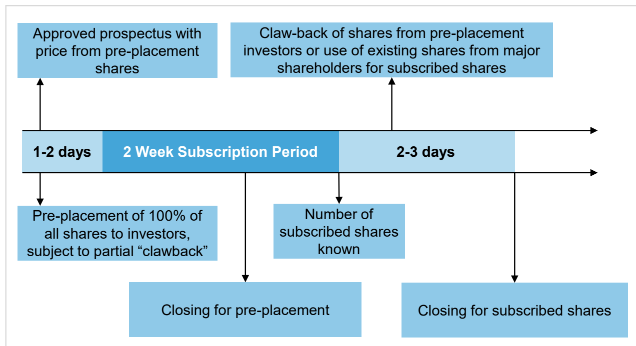
Fixed price discounted rights offering



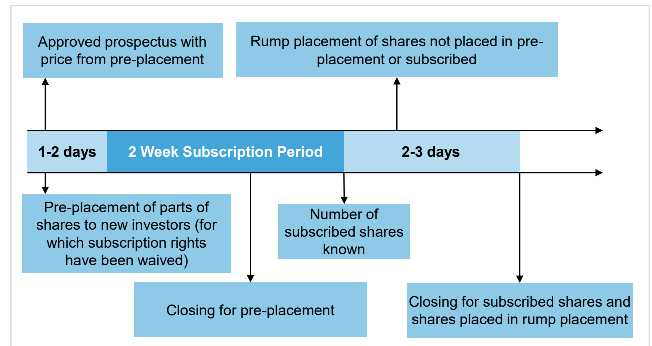
"At market" rights offering



Rights offering with "claw back" pre-placement



Rights offering with pre-placement and rump placement



7.6 "20%" Capital Increases Against Cash Contribution

There is a presumption that shareholder subscription rights can be excluded without a reason for capital increases against cash contribution which do not exceed 20% of the issuer's share capital, which has recently been increased from the previous 10% threshold. As a result, market practice established so-called "20% capital increases" which are used by companies to raise equity capital through private placements to institutional investors without a prospectus or a public offering. These private placements are typically conducted through so-called "accelerated book building" (ABB).

In an ABB, an issuer mandates one or more banks to act as underwriters for the capital increase. To avoid the need for an offering circular, ABBs are usually conducted around the time of release of the issuer's annual or interim report. This provides assurance that all material information about the issuer has been disclosed recently and that the issuer is not aware of any material non-public information.

7.6.1. Process and Price Setting

An ABB can be completed very quickly. It is possible to announce an ABB and sell all offered shares on the same day, sometimes within hours of the announcement. Some ABBs, however, involve several days of roadshow to gauge investor interest.

ABBs principally require the preparation of contractual documents, most notably an underwriting agreement with the underwriting banks, as well as preparation of corporate law resolutions and capital increase mechanics (such as, in Germany, coordination with the judge responsible for entering the capital increase into the commercial register (*Handelsregister*)).

The exclusion of subscription rights requires that the subscription price may not be significantly below the market price of the shares. In practice, a discount is generally considered to be significant if it is greater than 3-5% of the market price of the shares.

Investment banks work with the issuer to prepare an investor presentation for the ABB and the issuer decides whether to conduct physical roadshow meetings or telephone discussions with investors.

Once the shares in an ABB are sold to investors (the "pricing day"), the closing mechanics are similar to those in an IPO or other capital increase. The shares are created, typically via subscription by one or more of the advising investment banks, an application for listing of the shares is submitted to the stock exchange and typically 2 trading days after the pricing day (closing), the shares are booked to investors' securities accounts against payment.

7.7 Capital Increases in Kind

A capital increase in kind is an alternative to a capital increase against cash contributions. It involves one or more investors contributing an asset (*e.g.*, real estate, intellectual property or a business) to the issuer against receipt of new shares.

Subscription rights can usually be excluded for capital increases in kind because, typically, there are valid business reasons for the capital increase. Therefore, no public offering is required even if the number of new shares exceeds 20% of the issuer's capital.

A key timing consideration for a capital increase in kind is the legal requirement to prepare an expert report which validates the value of the contributed assets. The expert report must assess whether the contributed assets are valued at a reasonable market value.

8. REG S INVESTMENT GRADE BONDS

8.1 Introduction 60

8.2 Terms 61

8.3 Bond Process for stand-alone Reg S Bonds 63

8.4 Costs and Complexity 65

8.5 Finance Subsidiaries 66

8.1 Introduction

The European debt market has significantly deepened over the last two decades and is the main source of capital markets financing for European companies. Because of the historic prominence of the U.S. debt market, bonds that are sold only to investors in the European debt market and potentially elsewhere outside of Europe, but not sold in the U.S. or to U.S. persons, are referred to as Regulation S bonds (Reg S bonds) in reference to Regulation S under the U.S. Securities Act. If U.S. investors are included as part of a non-registered bond issuance to QIBs, such a bond would be referred as a Rule 144A bond (or a Rule 144A/Reg S bond) in reference to Rule 144A under the U.S. Securities Act.

Reg S bonds can be issued in various forms, tailored to the specific characteristics of an issuer and its needs, which in turn can have an effect on the complexity and required time for an issuance process:

- **Documentation:** Larger European companies typically maintain bond issuance programs which allow such companies to issue specific types of bonds quickly, based on existing and already-negotiated documentation (so-called Euro Medium Term Notes (EMTN) Programs or Debt Issuance Programs (DIP)). Smaller companies and, in particular, privately held companies rarely have debt issuance programs in place and thus have to follow the stand-alone Reg S bond issuance process, which requires longer preparation time for an issuance.

- **Investment grade vs. high yield:** The documentation and complexity of a transaction is most notably determined by the risk level associated with a bond issue. So-called "high yield issuances" with high interest rates and lower ratings generally require more stringent terms and conditions (including financial covenants) and specific high yield documentation in order to successfully market such bonds to investors.

- **Secured or unsecured:** The vast majority of bonds issued by investment grade issuers are unsecured. Providing security, such as asset pledges, account pledges or share pledges to investors is typically required to reduce the risk level for investors, but increases costs and complexity of a bond issuance.

- **Senior or subordinated:** Bonds are usually used on an unsubordinated senior basis. Subordination of bonds is typically used to "design" more equity-like bond instruments, such as long-dated hybrid bonds which are partially treated as equity by rating agencies and as equity for purposes of accounting, but as debt instruments for tax purposes. Subordination relates to the ranking of a financial instrument in an insolvency situation, *i.e.*, senior financial instruments will be satisfied before a subordinated bond receives any funds in an insolvency situation.

- **Convertible into shares or non-convertible:** An issuance process of a Reg S bond involves significant added complexity if the bond is convertible into shares.

This chapter outlines bond elements and issuance processes most commonly seen in investment grade bond issuances. The issuance processes for other bond types can significantly differ and are outlined further in this guide in the following chapters:

- Convertible bond processes in Chapter 9
- Subordinated long-dated hybrid bonds in Chapter 10
- High yield bonds in Chapter 14

This chapter also lays out the process for stand-alone Reg S investment grade bond issuances. Please refer to Chapter 11 "*Debt Issuance Programs*" for characteristics of the implementation process of debt programs.

Including sales to U.S. investors in accordance with Rule 144A can add significant complexity to a bond issuance process.

While the general characteristics of a Reg S bond laid out in this chapter also apply to a 144A bond, the issuance processes and timelines differ, most notably due to different due diligence requirements and prospectus disclosure requirements for a 144A bond issuance. This guide outlines these more detailed processes in the following separate chapters:

- 144A bond investment grade issuances in Chapter 13
- 144A high yield bond issuance processes in Chapter 14

8.2 Terms

8.2.1. Denomination

The usual denominations are €1,000 and €100,000 per individual bond. This is driven by regulatory principles:

- The offering of bonds with a minimum denomination of €100,000 is exempt from the requirement to prepare a prospectus. However, many Reg S bonds are listed on an exchange, which requires a Prospectus Regulation compliant listing prospectus for a listing on the regulated market. The listing on an unregulated market may also require a prospectus if the bond will be listed on a certain exchange standard which also requires a prospectus, such as the Scale segment of the Frankfurt Stock Exchange or the Euro MTF of the Luxembourg Stock Exchange. The minimum denomination of €100,000 is generally used for larger issuances for which post-issuance market liquidity and/or retail investor demand is not relevant enough to opt for a €1,000 denomination.
- Bonds with a denomination of €1,000 are standard for most smaller bond issuances and for bonds which are also sold to retail investors. However, also many larger bond issuances use the €1,000 denomination to increase post-issuance market liquidity. Bond offerings with a €1,000 denomination require an approved prospectus unless other prospectus exemptions are available, such as offering to qualified investors only or using a minimum offer size of €100,000 per investor or relying on the limited number of investors per EEA state exemption. €1,000 denominated bonds are typically listed on the regulated market of an exchange; thus, even if they are never offered to retail investors, the issuance process will typically require drawing up an approved prospectus.

8.2.2. Volume, Interest, Yield, Price and Maturity

The offering volume and the interest rate are the key economics for a bond.

The offering volume can be set as a fixed amount or can be left open and determined at pricing. Interest rate can be fixed or floating (*i.e.*, as a margin above a market rate such as EURIBOR).

The interest rate can be set at the beginning of the offering or determined after the offering starts as part of the bookbuilding exercise and based on investor demand. For the different processes to set these key economics, see section 8.3.6. below "*Bond Process – Placement Process*."

The maturity for Reg S bonds depends on the issuer's needs and the rating of the issuer or the bond. Most Reg S investment grade bonds, which are not hybrid bonds or convertible bonds, have maturity terms of 2 to 10 years, mostly 3, 5, 7 or 10 years but in certain cases can also have longer terms of up to 30 years or, in rare cases, even longer. Hybrid bonds with debt-equity hybrid type covenants, due to their equity-like nature, have very long maturities of 30 years and longer or no maturity (undated or perpetual) (see Chapter 10 "*Hybrid Bonds*"), while high yield bonds and convertible bonds typically have 3 to 7 year maturities.

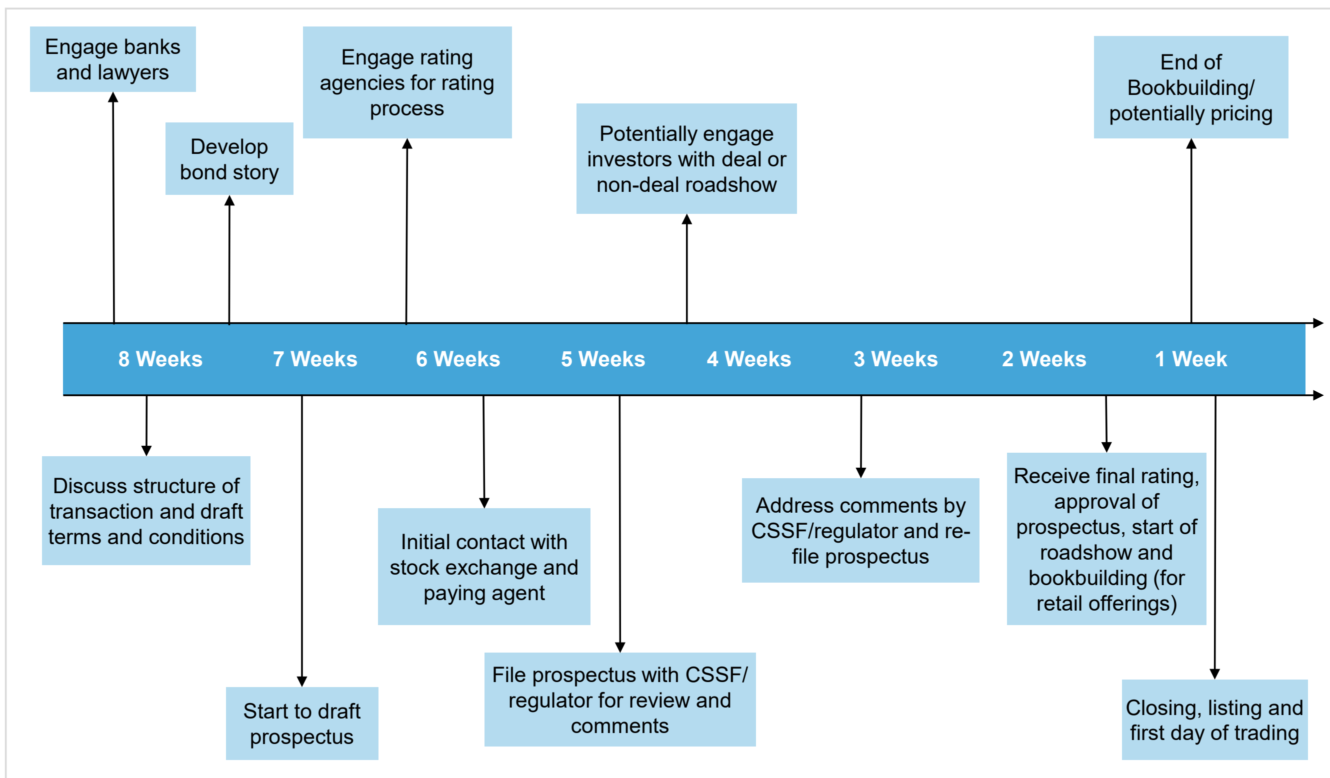
8.2.3. Key Terms and Conditions of a Reg S Bond

The terms and conditions of a bond include four main categories of information: (i) the key economics of the bond, as set out above, (ii) various technical aspects, such as the governing law, tax provisions, rules on bondholder actions, information on clearing and payment procedures or notifications, (iii) covenants, which are undertakings by the issuer to follow certain rules during the lifetime of a bond, and (iv) potential pre-payment events and events of default.

The table below sets out the key terms and conditions typically included in a Reg S bond. The covenants listed below are also, to a varying extent and often in a modified form, included in more complex bonds such as convertible bonds, long-dated hybrid bonds or 144A bonds.

Non-investment grade high yield bonds in particular include a range of additional covenants and restrictions when compared to investment grade bonds in order to provide additional protection to investors. See chapter 14 "*High Yield Bonds*" for more information.

Typical key terms of a Reg S bond	
Key commercial terms	Key commercial terms include denomination (typically €1,000 or €100,000), fixed interest rates and/or floating interest rates, offering volumes and maturity dates.
Subordination/Ranking	Subordination provisions specify whether the bonds are senior and rank at the same level (*pari passu*) with other senior obligations of the issuer in case of insolvency or subordinated. Most investment grade bonds are senior obligations.
Secured/ Unsecured	If a bond is secured, the security package is specified in the terms and conditions. Most investment grade bonds are unsecured.
Guaranteed/ unguaranteed	If the issuer is a finance subsidiary, a guarantee by the group's parent company is typically required. Additionally, in the context of high yield bonds, guarantees of other group companies (so called "upstream guarantees") may be included as an additional risk mitigation effort for the benefit of investors.
Change of control	Change of control provisions typically refer to an event in which a (new) investor acquires more than 50% of the issuer's voting capital, allowing the bondholders to ask for redemption of their bonds, e.g., at a price of 101% or higher of the principal amount.
Negative pledge	Negative pledge provisions require the issuer not to secure other financial or capital markets obligations with the same or a lower rank (typically other capital markets obligations) with assets or other security, unless bondholders receive the same type of security.
Cross-default	Cross-default provisions result in a default under the bond if the issuer or other members of its group have (i) failed to pay, or (ii) violated terms of other financial obligations. Cross-defaults usually provide a monetary threshold below which the cross-default is not triggered as well as a period of 15 to 30 days (or longer) during which the default can be cured.
Financial covenants	Investment grade bonds typically do not include financial covenants. High yield bonds typically include financial covenants to protect investors from an increasing risk profile of an issuer, such as debt-to-equity ratios, EBTIDA-to-net debt ratios or interest rate coverage ratios.
Asset sales and restricted payments	Depending on the issuer's rating and risk profile, additional covenants may protect the "substance" of an issuer by restricting asset sales (typically requiring "market price" payments for assets), dividends and other distributions to stakeholders (restricted payments).
"Early" redemption and repurchase rights	Redemption rights are typically included at the option of the issuer after a certain period of time and at a premium to the principal amount (e.g., at 101% after 3 years of a 5 year bond).
Other terms	Other terms include various technical provisions, including notifications, regulations for bondholders' meetings, the right to issue additional bonds of the same class and tax provisions.



8.3 Bond Process for stand-alone Reg S Bonds

Investment grade Reg S bonds by larger, frequent bond issuers, are typically offered through debt issuance programs. Companies which do not have debt issuance programs in place must use a stand-alone Reg S bond issuance process.

This chapter explains the steps to be taken for such an offering process. For hybrid bond issuances, convertible bond issuance and high yield bond issuances, this process can differ in various respects – the processes are set out in separate chapters in this guide.

8.3.1. Prospectus/Offering Circular

An offering of stand-alone Reg S bonds usually requires a prospectus if the bonds will be listed on a regulated market or a stock exchange standard requiring a prospectus, or if the bond will be offered publicly to retail investors without special exemptions applying.ww

Even if there is no legal requirement of an approved prospectus, issuers will often draft a so-called "offering circular," which includes most, if not all, the information of a prospectus, as a document to be provided to investors for their decision making process. For marketing purposes, such an offering circular is required for the issuance of bonds by practically all privately held companies (which are not required to publish information on their business or to publish annual or interim reports), in order to ensure that investors receive sufficient disclosure about the issuer and its business and can make an informed decision on whether to buy the bonds. Prospectus preparation for a company without public disclosure can require several weeks or even months.

Companies with existing public disclosure (annual or interim reports and a previously published prospectus) can use this disclosure as a basis for a bond prospectus or offering circular, but will still typically require significant drafting effort as part of a new bond issuance.

Issuers may wish to offer their bonds to retail investors in various EEA countries. To achieve this, the passporting (*i.e.* the notification of a prospectus to other authorities for use in other EEA countries) of an approved prospectus is generally unproblematic. However, certain countries require a translation of the summary chapter of the prospectus to the local language. This can result in additional fees and, in some cases, can have a timing impact.

8.3.2. Regulator

For non-equity linked bonds with a denomination of €1,000 and above, issuers can choose in which EEA jurisdiction to file for prospectus approval from the member state of the listing location, the public offering location and the seat of the issuer. Many issuers choose the Luxembourg CSSF because of its uncomplicated approval processes. For the CSSF to have authority, there must be either a listing of the bonds or a public offering in Luxembourg.

8.3.3. Ratings

Reg S bond offerings typically involve engagement of a rating agency to assess the creditworthiness of the bond issuer or its parent guarantor (for bonds issued by subsidiaries).This is one of the key differences between a straight bond issuance and a convertible bond or a German law assignable loan. The latter two do not necessarily require a rating of the bond or the issuer for commercial marketability.

The process of obtaining a rating is critical for the timing of a bond issue. Rating agencies require detailed information about the issuer (and/or its parent guarantor), including detailed financial information, in order to build forecast models of the ability to repay the bond. A debut rating process can be time consuming and costly.

The following illustrates Standard & Poor's rating scale:

Standard & Poor's	
Investment Grade	**Non-Investment Grade**
• AAA (Prime) • AA+, AA, AA-, A+, A and A- (high grade and upper medium grade) • BBB+, BBB and BBB- (lowest investment grade levels, close to speculative)	• BB+, BB and BB- (highest brackets for non-investment grade) • B+, B and B- (highly speculative) • CCC+, CCC and CCC- (substantial risk)
Substantial Risk/Default	
• CC and C (extremely speculative, respectively close to default) • DDD, DD and D (default)	

Ratings of CC and C are below the threshold that can typically result in a successful stand-alone Reg S bond issue. For further information, see Chapter 14 "*144A/Reg S High Yield Bonds*."

8.3.4. Investor pre-sounding

In order to gauge demand for a bond, issuers and their advising banks might engage several investors as part of market pre-sounding before a bond offering. This allows them to assess investor views of the issuer and, insofar as the bond issuance is discussed, of the key provisions and economics.

If the issuer already has outstanding securities, care must be taken before investors are approached with non-public information about a potential bond issuance, due to insider information and market abuse regulations.

The Market Abuse Regulation sets out detailed pre-sounding rules and protocol requirements, applicable since July 2016.

8.3.5. Comfort letters

Due to different liability regimes in Europe and the U.S., for some Reg S bond issuances, investment banks do not require comfort letters from auditors. However, in sizable bond offerings with prominent advising banks, comfort letters are customary. This involves additional costs and effort for the issuer.

8.3.6. Placement Process

There are several types of processes available to set the key commercial terms of a stand-alone Reg S bond:

- Setting the volume, interest and yield as well as potential other elements of the offer via a bookbuilding process in a private placement without the use of an approved prospectus, making use of a preliminary prospectus (so-called "red herring").

  In offerings of €1,000-denominated bonds, after placing 100% of the bonds to institutional investors, financial intermediaries can use an approved prospectus for a certain period to sell the bonds they purchased in the private placement to retail investors. This type of offering process accomplishes a sale of all bonds in the least amount of time and with few complications.

  A variant of this offering type is to use an approved prospectus, aiming to place 100% of the bonds in a private placement at the beginning of the offer period and placing any remaining bonds to retail investors after the private placement. In an approved prospectus only the final volume, interest and yield may be omitted. This information has to be published in a press release once available.

- Setting the volume, interest and yield at the outset of the offering, which includes private placements and sales to retail investors.

  Such fixed-price offerings require a clear indication before a bookbuilding of what interest rate is acceptable to investors. If the price turns out to be incorrectly set or if market conditions deteriorate during the offer period, this could result in a failed offering.

- Setting none or some of the key terms at the outset of the offering, which includes private placements and sales to retail investors.

  The issuer can provide an indication (such as a range of interest rates), but not fix the interest rate and yield at the outset of the offering in the prospectus. Additionally, the issuer can leave the total volume of the issuance open. The final terms are set at pricing at the end of the offer period based on investor orders. No supplement is required at pricing unless the offer structure (*e.g.*, the number of tranches or terms of the offering) changes. A pricing notice is otherwise sufficient.

8.4 Costs and Complexity

Reg S bonds involve significantly lower advisory costs, time and effort than bonds that include sales to U.S. investors based on Rule 144A. In particular, this is because of reduced due diligence efforts for lawyers and generally lower standards for prospectus disclosure resulting from different litigation environments. While the U.S. market has a historically more active litigation environment for securities offerings, the litigation environment in Europe, especially for bond issuances, is more issuer and investment bank friendly. As a result, in a U.S. bond offering, advising banks conduct extensive due diligence, receive disclosure letters from counsel and comfort letters from auditors. On the other hand, Reg S bonds do not typically include disclosure letters by lawyers and, for smaller issuances, may not even include a comfort letter process.

Bank fees can be significant for stand-alone Reg S bonds, but are typically lower than fees for 144A/Reg S bonds for investment grade issuers. Bank fees vary substantially depending on the issuer, offering volume and rating.

8.5 Finance Subsidiaries

Many Reg S bond issuers use non-German finance subsidiaries. These entities are specifically set up to facilitate financing of the group through bond issuances. The most notable finance subsidiary jurisdictions used by German parent companies are the Netherlands, Luxembourg and Ireland.

Setting up a finance subsidiary requires corporate efforts, tax analysis and internal issuer specific post-issuance corporate compliance. It also requires internal agreements between different members of the corporate group to channel funds raised by the finance subsidiary to other entities within the group.

Bonds issued by a finance subsidiary require a parent guarantee from the ultimate operating or holding parent entity of the group. This puts investors in the same position as if the respective parent company had issued the bond.

9. CONVERTIBLE BONDS

9.1	Introduction	68
9.2	Investors and Market	68
9.3	Corporate Law Requirements	69
9.4	Issuance Process for Pre-IPO Companies	69
9.5	Issuance Process for Public Companies	70

9.1 Introduction

Convertible bonds are the most prominent type of a class of securities called "equity-linked" securities. They combine a straight bond, typically fixed-interest, with a conversion feature that gives bondholders an option to convert the bond into shares of the issuer.

The key economics and principal features of convertible bonds can differ widely:

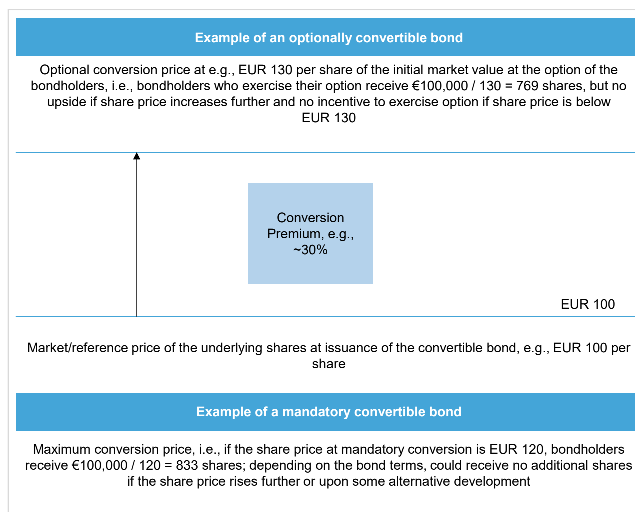
- **Optionally convertible bonds** issued by public companies rely on the conversion feature to issue shares to bondholders at their option, which reduces interest rates paid on the bonds because the optional conversion feature provides a potential upside for investors. However, conversion of bonds into shares also potentially dilutes existing shareholders if the share price performs strongly. Optionally convertible bonds can usually be marketed without a credit rating.

- **Mandatory convertible bonds** are typically issued by large investment grade public companies and include a conversion feature which, at the latest at maturity, mandatorily converts all bonds to shares. Issuers of this type of convertible bond are typically seeking to benefit from such bond's treatment as equity in the issuer's capital structure. Mandatory convertible bonds combine tax deductible interest payments with a deferred "capital increase" built into the bonds. Unlike optionally convertible bonds, mandatory convertible bonds typically have higher interest rates than straight bonds, because the conversion price at maturity may result in a loss to investors if the share price drops. These bonds are thus more "equity-like" than optionally convertible bonds.

- For many companies which have not yet listed shares on an exchange (pre-IPO companies), in particular start-ups without significant tangible assets, a convertible bond may be the only commercially feasible way to issue bonds. Investors seek to participate in the equity upside for relatively risky pre-IPO companies, and typically deem investing in a pure straight bond as too risky. Such convertible bonds, in most cases, convert into shares at an IPO.

An optional conversion feature may also be included in long-dated hybrid bonds (for long-dated hybrid bonds, see Chapter 10 "*Long-dated Hybrid Bonds*") in order to reduce the interest rate.

The following chart gives an example of an optionally and a mandatory convertible bond:



9.2 Investors and Market

Investors in pre-IPO companies are typically strategic investors, founders, private equity investors, venture capitalists, but also potentially include hedge funds, corporate investors, banks and insurance companies. The types of investors are issuer-specific and the process of engaging investors differs based on the individual circumstances of an offering. If only few investors who are known to the issuer wish to invest in a convertible bond, the key issuance process is negotiating the terms of the bond, with little or no marketing/offering materials or bank involvement.

Investors in optionally convertible bonds and mandatory convertible bonds are typically approached as part of a normal bookbuilding private placement procedure. These investors can be "long" investors (*i.e.*, investors interested in the underlying shares which can be obtained through the conversion feature) or "interest only" investors focused on the bond component.

This investor division is important for bond pricing. Investors that do not want exposure to the underlying shares use hedging to reduce or eliminate their exposure to the underlying shares' market volatility. This can be achieved principally by so-called "delta hedging" – selling "short" shares of the issuer when subscribing for the convertible bond and managing this short position over time. The more investors in convertible bonds use delta hedging, the more the market price of the underlying shares may come under pressure from short sales at the time the bond is issued. Which investors use delta hedging and which are long-only investors depends on the individual circumstances of the bond issuance. However, in many cases delta hedged investors represent a significant number of investors.

Convertible bonds are rarely offered to retail investors. Large companies typically sell convertible bonds in minimum denominations of €100,000 in private placements, which allows for the use of accelerated bookbuilding processes. In an accelerated bookbuilding process banks open their order book to investors to purchase bonds at some point during a day, and typically close the book only a few hours later or at the latest the next morning. Such a process is thus significantly faster and less subject to market risk than an offer process which stretches over several days or weeks. As a result, convertible bond offerings are usually made without a prospectus or offering circular. Convertible bonds may be sold in Reg S transactions as well as in 144A/Reg S transactions, depending on U.S. investor demand in the underlying shares and banks' advice.

Convertible bonds are rarely listed on a regulated market and issuers often do not even list them on an unregulated market. However, third party market makers often apply for a quotation of non-listed convertible bonds of public companies on the unregulated market (*Freiverkehr* in e.g. Frankfurt), which provides a market price of the bonds.

9.3 Corporate Law Requirements

Due to the equity-linked character of a convertible bond, a German issuer requires a corporate authorization for the (potential) capital increase. In accordance with the German Stock Corporation Act, most often contingent capital (*bedingtes Kapital*) is used for convertible bond issuances.

Similar to other equity raises, a German issuer requires shareholder authorization (75% of the capital present at the shareholders' meeting, or a different amount if so determined in the articles of association) to issue a convertible bond and must also comply with the subscription rights requirements set out by German law.

Market practice is to place convertible bonds only with institutional investors. Therefore, the bonds are rarely issued via subscription rights to existing shareholders. Subscription rights are excluded most frequently by relying on an exemption permitting a capital increase of up to 20% of the issuer's existing share capital against cash contribution. In order to use the up to 20% capital increase exemption, the German Stock Corporation Act requires a determination by the board of a German stock corporation that the convertible bond is not sold significantly below its market value. Unlike for the issuance of shares, where typically a 3-5% discount is deemed to comply with the criteria, convertible bonds create additional complexity when making such a determination. Advising banks usually provide calculations of the economics to support this finding. For a discussion of subscription rights, see Chapter 7 "*Equity Capital Increases outside of an IPO*."

9.4 Issuance Process for Pre-IPO Companies

Convertible bond issuances by pre-IPO companies target investors seeking upside in an IPO or if the company is sold. Therefore, the bond terms include provisions dealing with conversion into equity at an IPO or M&A event.

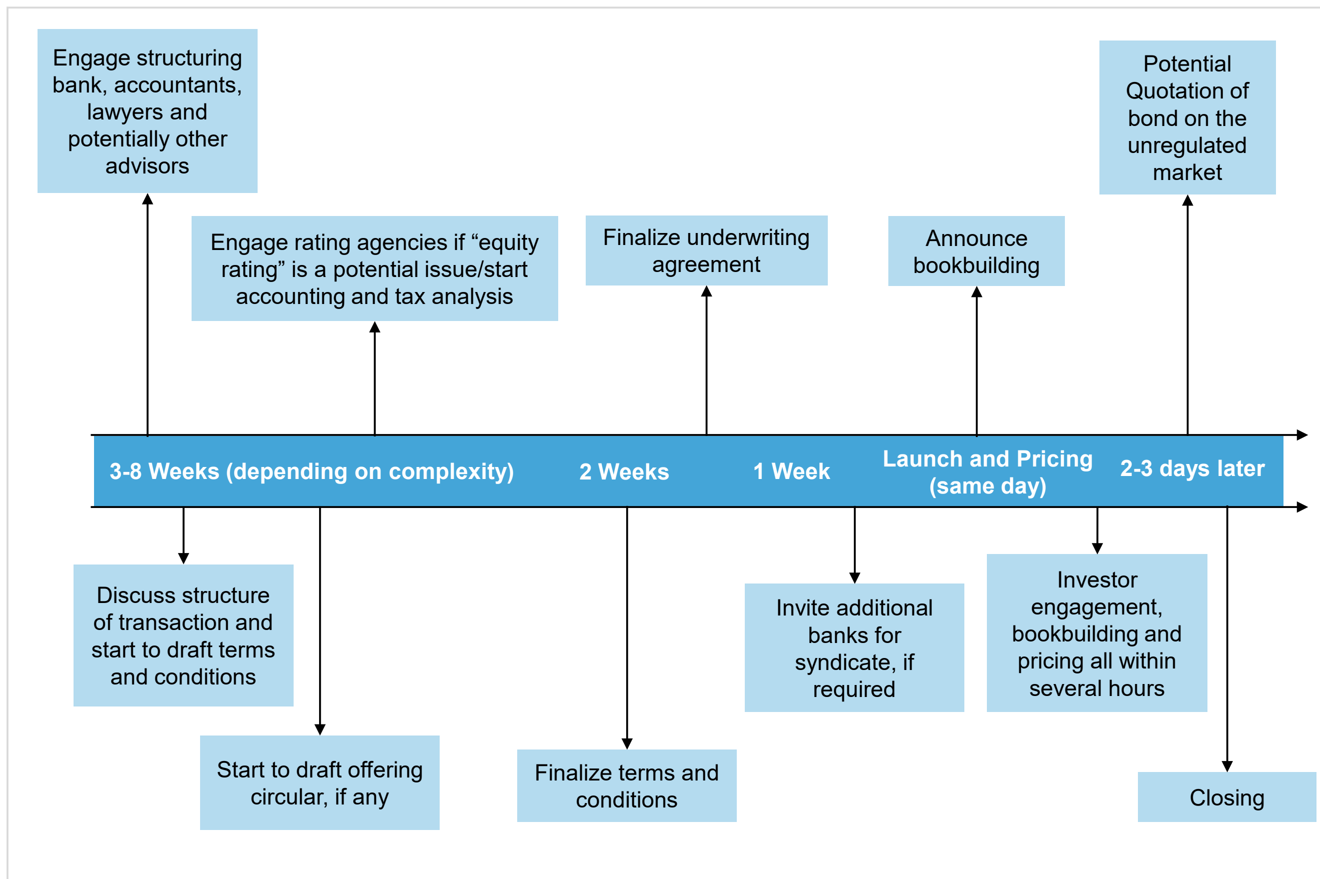
Various IPO-related provisions should be considered, such as post-IPO lock-ups, post-IPO corporate governance (*e.g.*, board representation), listing venue, involvement in the IPO process and other provisions necessary for protection of the convertible bondholders. As such, pre-IPO convertible bonds include many provisions typical for pre-IPO equity funding rounds.

Where a private company seeks new investors to place its convertible bond, the company must prepare an offering circular to be used in marketing, given the limited amount of public information about the company. Preparation of an offering circular, tailoring the terms of the bond to the issuer's situation, investor contacts and arrangements for potentially

granting security over the bonds, require substantial advance planning as well as financial and legal advice.

Pre-IPO convertible bonds are not widely used in the German market. Equity funding rounds or shareholder loans are seen as less complicated and are the preferred option for pre-IPO funding.

The following timeline shows a typical convertible bond issuance process:



9.5 Issuance Process for Public Companies

9.5.1. Mandating Advisors

Compared to an IPO or rights offering, convertible bond issuances by public companies are fast track processes. Convertible bonds are usually placed to institutional investors via accelerated bookbuildings (within one day).

An investment bank is mandated at the outset as a structuring advisor. Together with the issuer's legal counsel, the bank prepares the terms of the bond and negotiates an underwriting agreement for their placement. The bank also prepares a timetable, advises on pre-launch investor engagement and structuring matters and deals with rating agencies.

9.5.2. Prospectus/Offering circular

Convertible bonds are typically issued by public companies following an earnings release, without the use of a prospectus

or offering circular. This significantly reduces the time and effort required to complete an offering compared to other bond placements. In fact, with regard to timing and effort, a convertible bond issue closely resembles an ABB for a 20% capital increase (see Chapter 7 "*Capital Increases*").

Private placements of convertible bonds by public companies (even if made to U.S. investors in reliance on Rule 144A) typically do not require U.S. disclosure opinions from legal counsel. This generally obviates the need for extensive legal due diligence and preparation of a data room.

However, if a listing of the bond on a stock exchange is sought, a prospectus must be prepared. For German public companies, the practice of listing convertible bonds has increasingly fallen out of favor. Privately issued convertible bonds are often quoted on the unregulated market of a stock exchange by market makers. This creates a market for the bonds without listing effort or cost for the issuer.

In certain situations (*e.g.*, for liability considerations), it might be advisable to prepare an offering circular for a convertible bond issuance. In this case, depending on whether the bond is issued as a 144A/Reg S bond or a Reg S-only bond, various further issuance steps must be considered, as discussed in Chapter 8 "*Reg S Investment Grade Bonds*" and Chapter 13 "*144A/Reg S Investment Grade Bonds*". In particular, a 144A component in a convertible bond issuance will subject the issuer to the same liability regime as in a share offering to U.S. investors (so-called 10b-5 liability) – for more on liability, see Chapter 16 "*Liability in Securities Offerings*."

9.5.3. Due diligence

Due diligence for a convertible bond issuance is similar in scope to that for a 20% capital increase ABB. Banks generally rely on the issuer's public information and representation that all information material to investors has been published.

A management due diligence session usually takes place to address the banks' questions.

9.5.4. Terms and Conditions

Preparing the terms and conditions is a key work stream in a convertible bond issuance.

The following table shows typical convertible bond features in addition to standard bond terms and conditions:

Term	Description
Denomination	For public companies, typically €100,000 to take advantage of the private placement exemption; varies for pre-IPO companies
Interest/maturity	Standard convertible bonds: fixed interest paid once a year; maturity of 3 to 7 years (in most cases 5 years) Typical low-interest or no-interest convertible bonds: such bonds can be redeemed at higher than par and thus pay lower interest or no interest at all; maturity of 5 to 30 years
Conversion periods/ exclusion periods	Initial "exclusion period" in which no (optional) conversion can take place (typically 40 days) Conversion period starts after the initial exclusion period and ends at maturity (or shortly before for mandatory convertible bonds)
Conversion price for standard optionally convertible bond	Fixed conversion price set at a premium to the market price of the shares at issuance Typically a period in which the bond cannot be called by the issuer; potential option to redeem the bond at par if share price exceeds the conversion price significantly
Conversion price for standard mandatory convertible bond	Conversion price is set inside a conversion band based on the share price at issuance (*e.g.*, a 20% "upside" for bondholders) – bondholders are "protected" inside a certain band of share price changes. Conversion price can be adjusted so that bondholders profit to a small extent even if the share price increases more than 20% during the bonds' lifetime Typically only an option to call the bond by the issuer via a conversion at a make-whole premium
Conversion price for low-interest/zero coupon longer term convertible bond	Conversion price increases over the lifetime of the bond (due to the typically long maturities) Typically a call to redeem or convert if the share price is above the conversion price
Anti-dilution protection	In order to protect shareholders from dilution (which would dilute the value of the conversion right), there are detailed anti-dilution protections which adjust the conversion price for further capital increases, extraordinary dividend payments or if the share price changes as a result of a split-up, merger, etc.

9.5.5. Rating agencies

If an issuer is particularly interested in the equity treatment of a convertible bond (*e.g.*, for mandatory convertible bonds), rating agencies may be approached to review the bond terms in order to ascertain the most favorable equity treatment.

9.5.6. Tax and accounting treatment

Especially for first-time issuances and issuances via a foreign finance subsidiary, a detailed tax analysis of the bond terms and conditions should be performed in order to confirm that the tax and accounting treatment of the bond is not jeopardized by unconventional terms in the proposed terms.

9.5.7. Marketing, pricing and closing

To keep market risk from a change in the share price to a minimum, the transaction is launched and priced within several hours.

Where no offering circular is used advising banks just use a term sheet summarizing the bond's terms and conditions. Issuer's management may participate in an electronic roadshow or attend telephonic meetings with certain investors.

An underwriting agreement is signed at pricing of the offering. Closing usually occurs within 2 to 5 trading days after pricing.

Following closing, any bonds converted into shares require delivery of shares admitted to trading on a stock exchange. Applications must be made to the relevant stock exchange(s) for admission to trading of such shares. Within the EEA, the Prospectus Regulation provides an exemption from the prospectus requirement to list such shares.

10. HYBRID BONDS

10.1 Introduction 75

10.2 Regulatory Capital Hybrids vs. Corporate Hybrids 75

10.3 Rating, Equity and Debt Treatment 75

10.4 Issuance Process 77

10.5 Key terms and conditions 77

10.1 Introduction

Long-dated hybrid bonds are a form of bonds which is "equity-like" due to its very long maturity (minimum of 30 years). Such bonds can also be undated, *i.e.*, without a maturity date.

Due to their equity-like treatment, hybrid bonds do not include, or include only limited, covenants that are typical for debt instruments for the issuer to comply with.

Hybrid bonds allow the issuer to defer interest payments as long as no dividends are paid to shareholders and no interest is paid on similarly ranked bonds. As such, hybrid bonds can theoretically not pay any yield to investors prior to maturity, which makes these instruments higher risk.

In order to provide the issuer with the regulatory benefits of their equity-like nature, long-dated hybrid bonds are structured within a tight set of regulatory, tax and accounting requirements.

Hybrid bonds typically carry higher interest rates than straight bonds due to their equity-like features. They are issued principally in Reg S transactions in Europe. The majority of investors are investment funds, insurance companies, pension funds, banks and, to a small extent, other investors, including retail investors. Long-dated hybrid bonds can also be issued in Rule 144A transactions. However, this is rare due to limited investor demand in the U.S. and additional requirements for a Rule 144A placement.

Investors expect that hybrid bonds are repaid at the "step-up", which is typically after 5 to 10 years after issuance.

10.2 Regulatory Capital Hybrids vs. Corporate Hybrids

Issuances of long-dated hybrid bonds can be divided into bonds issued by: (i) banks and insurance companies to raise capital in order to fulfill regulatory requirements and (ii) other corporate issuers, principally for rating purposes.

- Traditionally, issuances by banks have made up a large part of the long-dated hybrid issue volume. Banks' regulatory capital requirements include brackets for the issuance of hybrid securities that count toward prescribed regulatory requirements. European regulatory framework and specific technical standards provide detailed guidance for hybrid bond covenants.
- Insurance companies are regular issuers of long-dated hybrid bonds, likewise due to regulatory capital requirements. The European capital regime "Solvency II", as amended by "Omnibus II", has set the standards for long-dated hybrid issuances by insurance companies.
- Issuances of long-dated hybrid bonds by non-financial corporate issuers are more common in a low interest rate environment. Before the gradual increase of interest rates starting in July 2022, large German corporate issuers have issued substantial volumes of hybrid securities, taking advantage of low interest rates. Increasingly, mid-cap corporate issuers have also shown interest in long-dated hybrid bonds as an alternative to a capital increase and to optimize their debt/equity ratio.

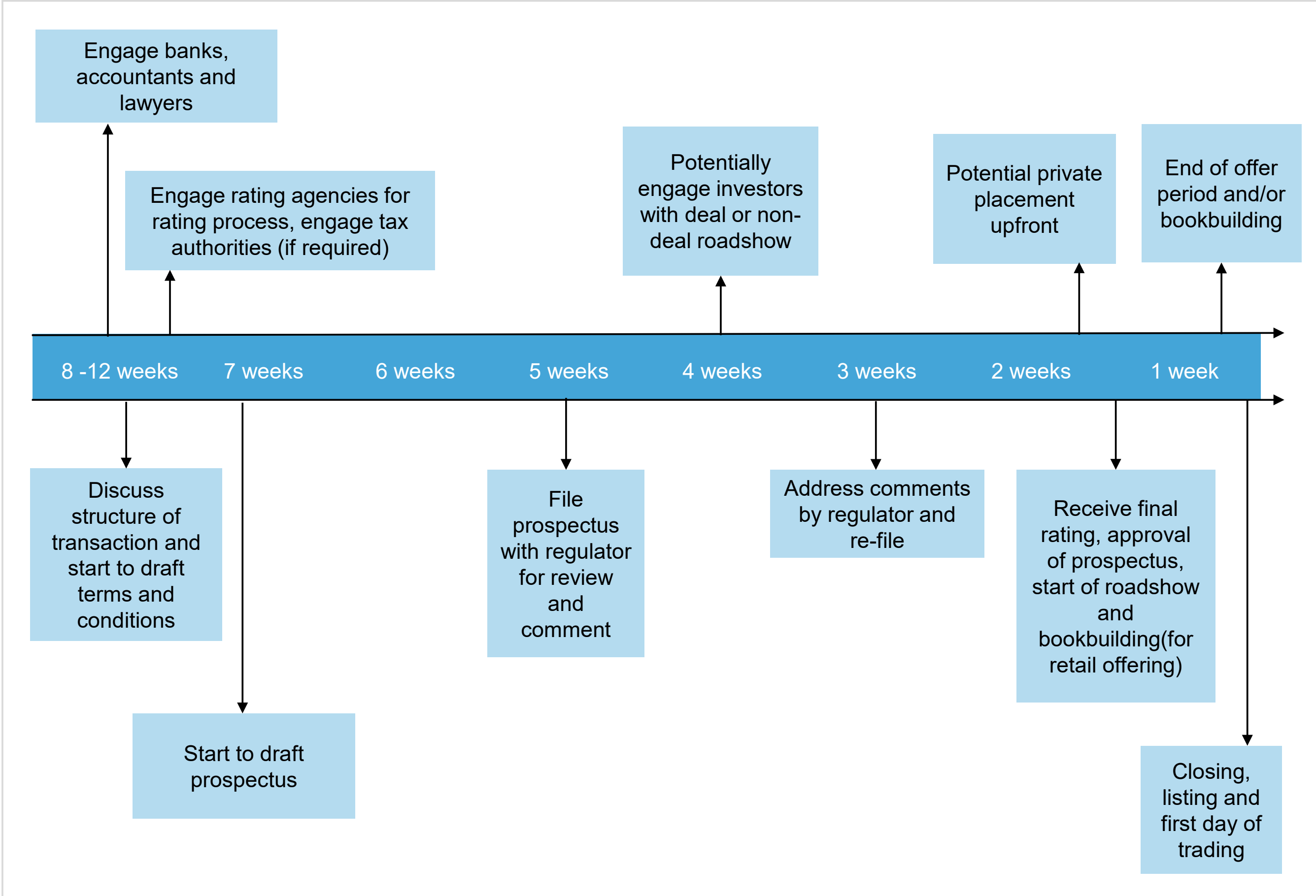
Hybrid bonds are generally not attractive for smaller or pre-IPO corporate issuers. These companies are more flexible in managing their capital structure by issuing shares or convertible bonds and are less concerned about maintaining a particular investment grade rating. Additionally, investors may be less interested in a long-dated hybrid issue by a small company or, if interested, may require a significant risk margin.

10.3 Rating, Equity and Debt Treatment

Rating treatment of long-dated hybrid bonds is a key topic for issuers of the bonds. Based on a detailed review of the terms of the bonds and the issuer's capital structure, rating agencies generally treat a portion of long-dated hybrid bonds as equity for rating purposes. There are, however, limits for equity rating treatment depending on the issuer's overall capital structure.

Hybrid bond terms must adhere strictly to tax and accounting rules applicable in the issuer's jurisdiction (and, where issued through a foreign finance subsidiary, the parent guarantor's jurisdiction). Accountants and tax advisors must be involved in the preparation of the bonds' terms and conditions. Tax and accounting opinions may be required, particularly for first-time issuances or unusual structures. It may also be necessary to seek guidance from tax authorities regarding the tax treatment of a hybrid bond issuance.

The following chart shows a typical timeline for a hybrid bond issuance:



10.4 Issuance Process

Long-dated hybrid bonds are typically either issued in (i) €100,000 denominations for issuances without a retail investor component or (i) €1,000 denominations where there is a retail component.

In some instances issuers conduct public offerings in several EEA countries to increase retail participation, which can enhance the bonds' secondary market performance. Retail offerings require an approved prospectus as well as a key information document (KID) if a bond offered to retail investors is classified as a packaged retail and insurance - based investment product (PRIIP). An approved prospectus is also required if a listing on the regulated market is contemplated.

The principal timing considerations for a hybrid bond issuance are (i) the preparation and approval of a prospectus and (ii) the rating process. In particular for first-time issuances, there are added complexities, such as discussions with regulators regarding the bonds' treatment as regulatory capital (to comply with minimum regulatory capital requirements) and discussions with tax authorities regarding deductibility of interest. Issuer's accounting staff and auditors also review the bonds' terms and conditions to ascertain that the accounting treatment will recognize part of the bonds as equity.

First-time issuances can require several months of preparation and are more complex and time consuming than debut straight bond issuances. Although hybrid bonds may be issued as part of a drawdown from a debt issuance program, in practice they are usually issued as stand-alone bonds. Depending on the issuer and potential changes in regulatory or tax treatment, follow-on issuances may also require long preparation times.

10.5 Key terms and conditions

10.5.1. Non-call periods

A key feature of the "equity-like" status of hybrid bonds is the inability of the issuer to redeem (*i.e.*, repay or "call") the bonds for a certain initial period except certain events detailed below. The initial non-call period is usually referred to in the title of the bonds, together with interest rate and maturity (*e.g.*, a "NC5 4% fixed-to- floating rate bond maturing in 2060" refers to a hybrid-bond with a 5-year initial non-call period and 4% initial fixed rate interest).

Non-call periods are typically between 5 and 10 years but can be up to 15 years. The longer the non-call period, the more risky the instrument from an investor's point of view, which results in higher interest rates on bonds with longer non-call periods.

In the non-call period, issuers may redeem bonds only under certain circumstances, typically if:

- a tax event occurs and interest payments are no longer deductible, *i.e.*, due to change in tax legislation;
- an accounting event occurs and the partial equity treatment of the bonds is questioned or revoked;
- a change in rating agency methodology results in the bonds' less favorable rating treatment than at issuance; or
- a "gross-up" event occurs and the issuer, as a result of a regulatory or legal change, must make additional tax payments under the bond.

During the non-call period, the issuer may redeem hybrid bonds in full as a result of a specific redemption event, however, the bonds' terms (in most cases) permit the issuer to purchase its own bonds on the open market. The issuer can therefore launch a tender offer for the purchase of its outstanding hybrid bond even before expiration of the non-call period.

10.5.2. Deferral of interest

The most "equity-like" feature of long-dated hybrid bonds is the issuer's option to defer interest payments. Deferral can be triggered at any time. It is, however, conditioned on the issuer not paying dividends to shareholders or interest on any other equity or debt instrument which is ranked *pari passu* or junior to the hybrid bonds. Deferred interest on hybrid bonds accrues during the deferral period and must be paid once the issuer pays a dividend or interest on other *pari passu* instruments.

10.5.3. Interest step-ups and maturity

Long-dated hybrid bonds have maturities of at least 30 years. These bonds are typically issued with maturities of 30 to 50 years or without maturity dates (undated or perpetual bonds).

However, hybrid bonds include an incentive for the issuer to redeem the bonds after expiration of the non-call period. This is achieved through "step-ups," which are periodic increases in the interest rate after the non-call period.

In practice, after the initial fixed rate non-call period, the interest rate changes to a floating rate at a pre-set margin above a defined bank rate (for EUR-denominated bonds, typically EURIBOR). The interest rate margin increases in steps, *e.g.*, 25 basis points initially and 75 basis points after another period. The step-ups may not exceed certain thresholds.

Otherwise, there would be economic pressure on the issuer to redeem the bond immediately following the non-call period. This would defeat the "equity-like" feature of a long maturity.

In addition, rating agencies typically do not consider hybrid bonds that are outstanding after expiration of the non-call period as part equity. This can also incentivize the issuer to redeem the bond once the non-call period ends.

10.5.4. No events of default

A long-dated hybrid bond may not include an event of default which could allow the issuer to intentionally trigger repayment of the bond within the non-call period.

10.5.5. Special Consideration for Regulatory Capital

The terms and conditions offered by issuers of regulated hybrid capital (banks and insurance companies) require significant additional considerations compared to those offered by corporate issuers of hybrid capital. Terms and conditions need to comply with all regulatory requirements for the type of hybrid capital issued, such as the EU Capital Requirements Regulation (CRR), as amended, and its technical and other implementation provisions for banks and the EU Solvency II Directive, as amended by the Omnibus II Directive, and its national implementation, technical and other provisions for insurance companies. The terms and conditions offered by these issuers will also need to be approved by the competent jurisdictional authority. The specific additional processes and rules for issuers of regulated hybrid capital are not set out in this guide.

<table>
<tr><th>Key terms required for treatment as a hybrid bond</th><th>Ancillary general terms</th></tr>
<tr><td>

Senior in ranking only to shares or instruments ranking pari passu or junior to shares
Can rank pari passu to other debt obligations, but principally only pari passu to other hybrid instruments such as long-dated hybrids or convertibles
Fixed to floating rate interest with interest rate step-ups (typically an initial 25 basis points and then an additional 75 basis points)
Interest deferral at the issuer's option as long as there are no payments of dividends on shares or interest on other obligations junior or pari passu to the hybrid bond
Deferred interest accumulates and must be paid at maturity or when dividends or interest are paid on shares or other obligations junior or pari passu to the hybrid bond
No redemption within the non-call period except where accounting, tax or rating treatment changes
No events of default except for non-payment of interest or principal, including no cross-default
S&P requires a statement of intention to issue a new hybrid bond or equivalent instrument in case of redemption or repurchase of the bond, with certain exceptions. This statement is appended to the terms and conditions but is not legally binding

</td><td>

Can include a denomination of €1,000 to support secondary market performance or a standard €100,000 denomination
Parent guarantee if bond issued by a finance subsidiary
Repurchase via the stock market or otherwise and redemption option if more than 80% of the outstanding notes have been repurchased
Issuer can issue further hybrid bonds that are fungible (i.e., have exactly the same terms) with the original hybrid bonds
Substitution of issuer if a finance subsidiary is used and parent guarantee remains in place
Typically, German law is the governing law for bonds issued by German companies or groups
Typically Reg S only

</td></tr>
</table>

11. DEBT ISSUANCE PROGRAMS

11.1 Introduction 81

11.2 European Programs 81

11.3 U.S. Debt Issuance Program 84

11.1 Introduction

The majority of debt issuances by German corporate issuers are completed via debt issuance programs. There are several types of programs:

- **European medium term notes (EMTN) programs or debt issuance programs (DIP):** These programs are by far the most important debt fundraising tool for German corporate issuers. The programs are set up on the basis of an approved base prospectus which is updated annually. Under these programs, issuances (draw-downs) can be completed quickly (within days) based on market conditions using the previously agreed documentation. While it is possible to issue Rule 144A bonds under a European debt issuance program, due to disclosure and due diligence requirements related to a Rule 144A component, the programs are usually limited to Reg S issuances of bonds only.
- **U.S. debt issuance programs:** A limited number of European issuers (typically financial institutions) have set up SEC-registered "shelf" debt issuance programs which are used to access the U.S. market. Due to ongoing high maintenance and regulatory requirements, utilization of SEC shelf registrations by German issuers is rare. As an alternative, a Rule 144A debt program can be set up, which may be useful for regular Rule 144A issuers and does not require compliance with the U.S. reporting obligations applicable to issuers with registered debt issuance programs.
- **Commercial paper programs:** Due to different legal requirements applicable to short- and medium-term notes, notes with maturities of less than 1 year are issued pursuant to so-called commercial paper programs. Issuers set up different programs for the European and U.S. markets due to different regulatory requirements. Commercial paper programs are used predominately by financial institutions which require substantial short-term funding at the best available rates.

Most German companies which regularly issue bonds maintain a European debt issuance program. Companies which do not maintain a debt issuance program need to complete a stand-alone bond issuance process to issue a bond, which is explained in more detail in Chapter 8 "*Reg S Investment Grade Bonds*" for Reg S bonds and in Chapter 13 "*144A Investment Grade Bonds*" for 144A bonds.

European companies may also set up debt issuance programs in jurisdictions outside the EU or the U.S., such as in Canada, Australia or Japan, depending on the specific requirements of the issuer's group.

11.2 European Programs

11.2.1. Initial Steps

A European debt issuance program is typically set up early in the issuer's fiscal year on the back of the annual financial statements for the previous year. This ensures that the first (regular) program update (to reflect the next annual results) is a full year away.

A program will typically include an arranger and several dealer banks (not all of whom advise on the program set-up).

It is not necessary to conduct a draw-down immediately following the establishment of a program.

Often legal counsel for the banks, who function as transaction counsel, drive the process of establishing the program and drafting the required documentation, including the base prospectus, dealer agreement and agency agreement.

11.2.2. Base Prospectus

A debt issuance program provides a framework for future draw-downs. As such, a key program document is the base prospectus, which sets out terms of the different debt securities that can be issued under the program.

11.2.3. Regulator

Setting up a European debt issuance program typically requires a preparation time of about two to three months. The actual time required depends on the regulator chosen to approve the base prospectus.

The following table sets out the main elements of a base prospectus:

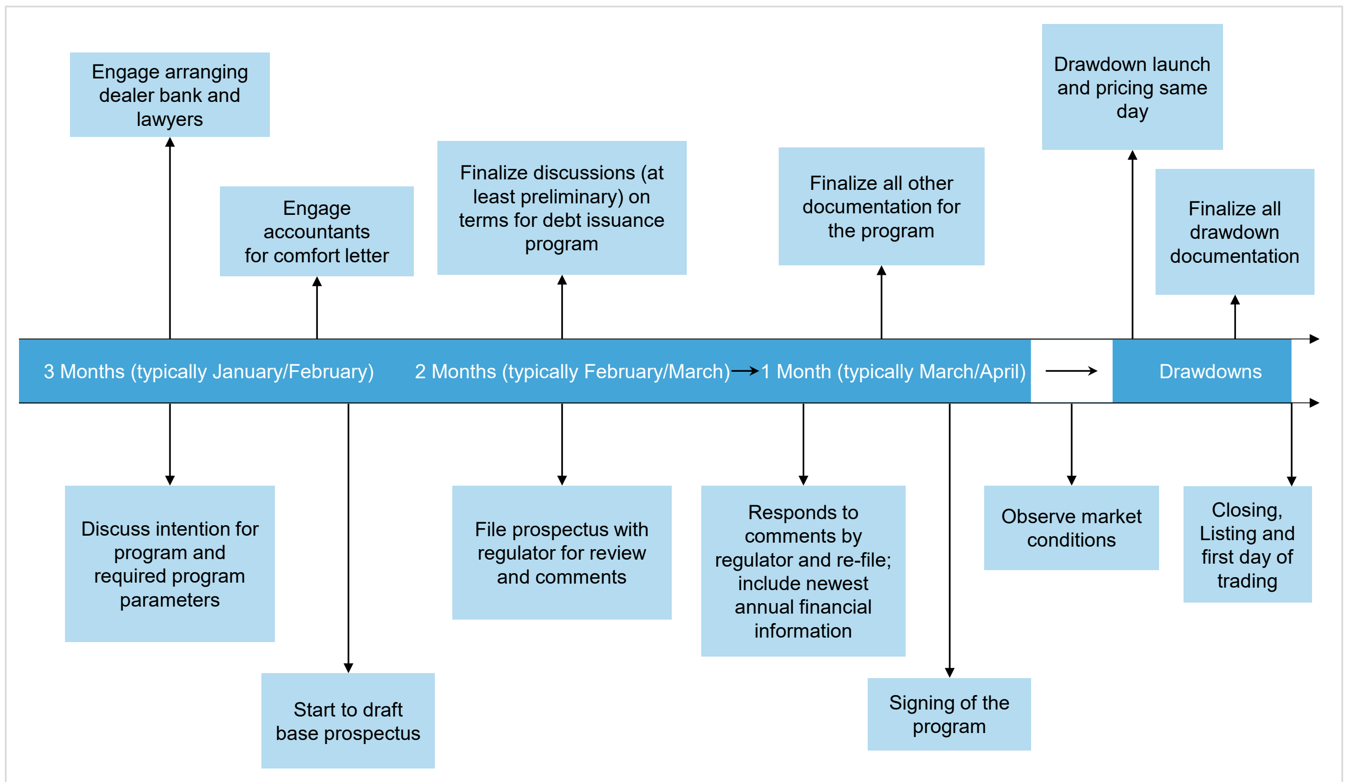
Term	Description
Risk factors	Description of material risks affecting the issuer (and its parent guarantor if issuer is a finance subsidiary) and the notes to be issued under the program; typically based on existing disclosure such as the risk report in the annual report
Business and other required information	EU Prospectus Regulation requires certain information about the issuer (and any parent guarantor), *e.g.*, organizational chart, information about the market and business, financial information for the last two full years and any interim period, and corporate governance disclosures
Issue procedures	Description of how draw-downs will technically be carried out under the program
Terms and conditions	Terms and conditions for all securities issuable under the program (typically fixed-rate and floating-rate notes) Presented as a framework with multiple options for different currencies, redemption features or floating rate mechanisms
Guarantee	Most programs allow for issuance of notes by various finance subsidiaries (to take advantage of favourable tax regimes but also for other reasons, such as raising funds in a particular jurisdiction) In this case, the base prospectus includes a parent guarantee
Form of final terms	Form of final terms used to specify the terms of each draw-down Structured as a "check-the-box" form setting out specific optional terms
Other provisions	Certain other provisions required by the EU Prospectus Regulation, *e.g.*, tax implications for investors, provisions regarding resolutions of noteholders and other general information
Incorporation by reference	Parts of the annual and interim reports are incorporated by reference into the base prospectus. As of December 2024, an issuer will be able to incorporate future new annual or interim financial information into a base prospectus during the 12-month life of the prospectus without needing to prepare a prospectus supplement specifically to incorporate that new financial information.

For programs with bonds that have a minimum denomination of €1,000, the issuer can choose to approach the regulator of its home member state or another member state, if a listing or public offering is contemplated in such state. Typically, German issuers either chose the Luxembourg CSSF or BaFin as the competent regulator for their European debt issuance programs.

11.2.4. Dealer Agreement, Agency Agreement and Ancillary Documents

The issuer and the investment banks acting as dealers for draw-downs enter into a dealer agreement framework (which does not create any commitments). The agreement includes representations and warranties, indemnities and other provisions similar to an underwriting agreement for a stand-alone Reg S bond issuance.

The following graph shows an indicative timetable for setting up a European debt issuance program:



A program will usually also require preparation of other documents, including a paying agency agreement, legal opinions and comfort letters from auditors.

11.2.5. European Program Draw-downs

The key benefit of a debt issuance program is the speed and flexibility with which a "draw-down" (*i.e.*, a specific issuance of bonds) can be completed, allowing issuers to take advantage of favourable market conditions. A draw-down can be prepared within days and launched and priced within hours.

At the launch of a draw-down, investors are provided with a term sheet. All remaining legal documentation is finalized after the bonds have been sold to investors and before closing.

This includes the finalization of the final terms, the subscription agreement between the issuer and the banks, dealer confirmations, legal opinions and comfort letters (as required).

11.3 U.S. Debt Issuance Program

German and European issuers can also establish a U.S. debt issuance program. This can be an SEC-registered program to allow for public offerings of securities to U.S. investors or a Rule 144A program for sales to institutional investors.

Due to the costs and effort involved in an SEC-registered program, relatively few large European issuers maintain such a program. An SEC-registered program provides European companies access to U.S. capital markets on the same market conditions as are available to U.S. companies. This can represent a significant cost benefit for frequent issuers and is a way to hedge the risk that European markets "close up" or become more expensive.

Some European issuers that regularly issue Rule 144A debt set up U.S. unregistered debt programs. Setting up a Rule 144A program involves principally the same process as a Rule 144A/ Reg S stand-alone bond issuance. Maintaining the program requires (typically semi-annual) due diligence updates.

Unlike SEC-registered debt programs, Rule 144A programs do not expose the issuer to increased liability or more stringent internal compliance requirements compared to a Rule 144A/ Reg S stand-alone bond issue.

The benefit of a U.S. debt program is quick access to U.S. markets for drawdowns, compared to the typical 2-3 months process required to prepare a Rule 144A/Reg S stand-alone bond issuance.

12. ASSIGNABLE LOANS (SCHULDSCHEIN-DARLEHEN)

12.1 Introduction 86

12.2 Volume and maturities 86

12.3 Advantages and disadvantages compared to bonds 87

12.4 Schuldscheindarlehen Issuance Process 88

12.1 Introduction

German law assignable loans (*Schuldscheindarlehen*) are an internationally unique form of corporate financing which has developed in Germany and is, in this form, not available outside of German law governed instruments (with the exception of Austria). A Schuldscheindarlehen is an assignable loan typically arranged by one bank, which is then sold to investors, typically in tranches of €1 million and multiples thereof. Under German law, due to the loan nature of Schuldscheindarlehen, they cannot be traded on a stock exchange, and are typically held long-term by investors, even though they can be sold to other investors via assignment and assumption.

Investors in Schuldscheindarlehen traditionally included insurance companies and banks with a significant number of German saving banks (*Sparkassen*). In recent years, other investors, including funds, have added Schuldscheindarlehen to their portfolios. Investors from outside of Germany, such as European and Asian funds, have also started to increasingly engage in the Schuldscheindarlehen-market as a way to diversify their investment portfolio.

Issuers of Schuldscheindarlehen have historically been German private companies seeking an uncomplicated, fast track private placement alternative to a traditional bond issuance. Typically, the volume raised via a Schuldscheindarlehen issuance is between €50 million and €250 million, serving a niche for companies which usually rely on bank financing and do not want to issue a bond or are reluctant to access the U.S. capital markets via a so-called U.S. Private Placement (USPP).

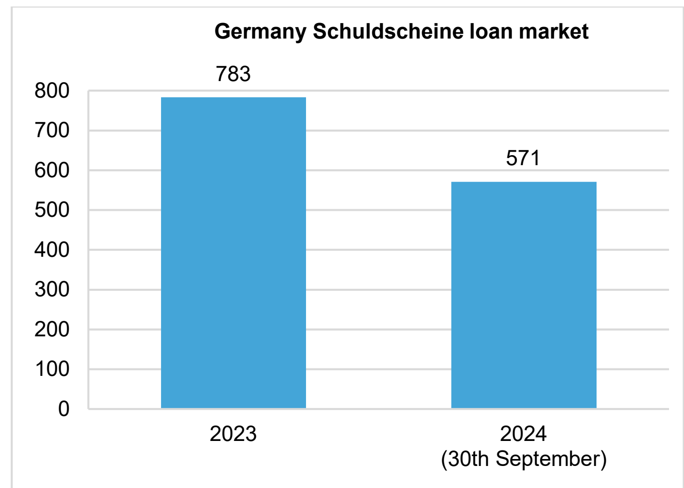
This traditional field of issuers has widened significantly in recent years with small, mid-cap and large public companies also increasingly issuing Schuldscheindarlehen. The achievable issuance volumes for a single transaction have also increased in recent years, with several transactions exceeding €1 billion.

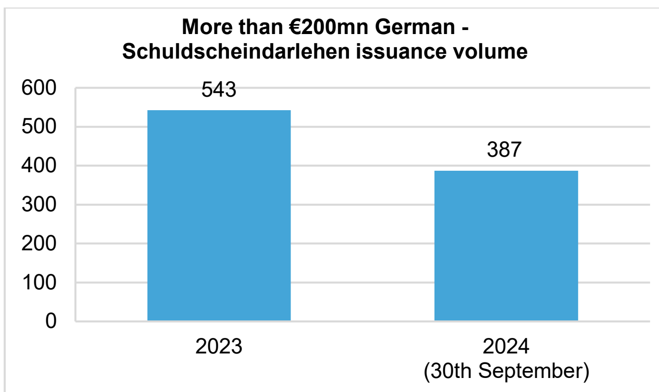
Schuldscheindarlehen have also been increasingly used by foreign companies including Austrian, Northern European, UK, French and other issuers.

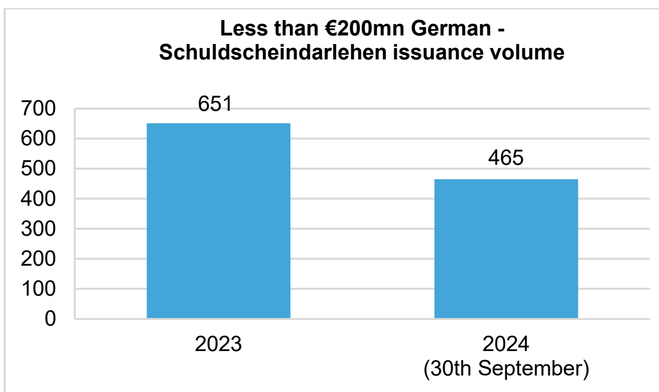
An alternative German capital markets financing instrument exists in the form of registered notes under German law (*Namens-schuldverschreibungen* or n-bonds) which have many commercial aspects in common with a Schuldscheindarlehen, most notably that they are equally illiquid. N-bonds are usually used for maturities of above 10 years. This guide does not provide an in-depth description of the n-bond issuance processes. Please contact us if you would like further information on this topic.

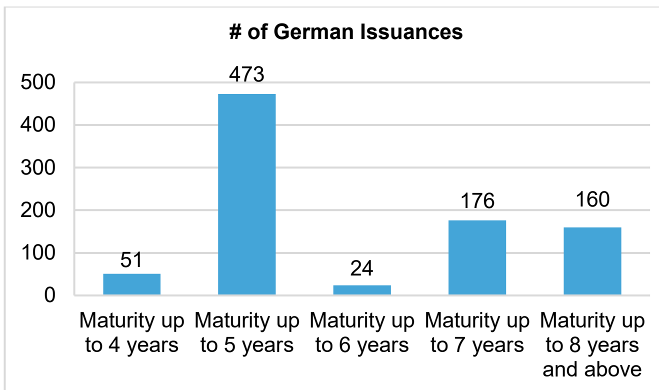
12.2 Volume and maturities

The following graphics show the number of Schuldscheindarlehen issued in Germany in 2023 and in 2024 until September 30, as well as a split between transactions with more than a €200 million issuance volume and transactions with issuance volumes below €200 million:









12.3 Advantages and disadvantages compared to bonds

Advantages of issuing Schuldscheindarlehen include, in particular:

- Diversifying a company's capital structure;
- Avoiding the more complex Rule 144A or Reg S-only bond process for issuers without medium or upper grade investment grade ratings, including no requirement for a bond prospectus (although an information memorandum is prepared);
- Less complex and shorter lead times until issuance with generally less complex documentation (although Schuldscheindarlehen-documentation in recent years has become more complex);

The typical length of a Schuldscheindarlehen loan is 2 to 10 years, with most such loans having a maturity of 4 or 7 years.

- Lower cost of issuance, particularly fees for the arranging bank are typically lower than for a stand-alone bond;
- Provides an alternative to unrated companies which do not want to go through a rating process to raise funds;
- The Schuldscheindarlehen-market is generally more stable and liquid over the years than the bond market as evidenced by the relatively stable number of transactions with growing volumes for larger transactions; and
- Avoiding public post-issuance and post-listing compliance obligations of a bond, but the Schuldscheindarlehen documentation requires the regular provision of reports to lenders.

Specifically for M&A financing, Schuldscheindarlehen have been an increasingly preferred choice for German companies, particularly German private companies and German small and mid-cap companies.

Disadvantages for issuing Schuldscheindarlehen include:

- Typically higher interest rates compared to bond issuances;
- No market price for Schuldscheindarlehen, as they are not traded;

- No collective action mechanisms to change the terms and conditions or receive waivers for covenants breaches if the issuer is in financial difficulties;
- Compared to investment grade bonds, historically lower issuance volumes, but this disadvantage is increasingly less problematic with high-volume precedent issuances; and
- Typically does not allow for early repayment at the option of the issuer.

12.4 Schuldscheindarlehen Issuance Process

12.4.1. Mandating a bank

Schuldscheindarlehen are often arranged by German state banks as well as by large German investment banks.

The arranging bank will analyze the requirements with the issuer including issuance volume and specific requirements for the terms and conditions of the Schuldscheindarlehen and provide an overview of the required timing.

12.4.2. Documentation

The core document is the Schuldscheindarlehen loan agreement (*Schuldscheindarlehensvertrag*) which is modeled according to the terms of a bilateral loan, but includes various market standard terms. The documentation is fairly standardized, with specific terms and any financial covenants tailored to the specific issuer.

Even though the Schuldscheindarlehen agreement has become more lengthy, compared to English law or U.S. law credit agreements or compared to bond terms and underwriting agreements, the documentation is generally less complicated.

Marketing Schuldscheindarlehen requires information about the company as part of a marketing information package. This includes a roadshow presentation as well as an information memorandum, for a non-public issuer, including annual and interim reports of the issuer. Because of the private placement character of a Schuldscheindarlehen placement process, issues arising in bond processes such as legal due diligence for Rule 144A/Reg S bonds or strict form requirements for the documentation generally do not exist. The arranger, together with the issuer, assembles the marketing package for distribution to potential investors.

The following table shows a comparison overview of a Schuldscheindarlehen and a bond:

Term	Schuldscheindarlehen	Bond issuance
Documentation	• Standardized loan agreement under German law • Marketing information package	• Prospectus • Underwriting agreement
Type of Instrument and Trading	• Bilateral, non-tradable but assignable loan, low liquidity and OTC market only	• Tradable note, typically listed on an exchange
Typical Volume	• Starting at about €20 million, typically €50 to €250 million with issuances above €1 billion possible	• €15 to €150 million for Mittelstandsanleihen • €100 million to several billions for investment grade issuances • €150 million or more for 144A/Reg S high yield bonds or Reg S-only high yield bonds • Typically U.S. $500 million or more for 144A/Reg S investment grade bonds
Rating	• No rating is required	• Typically, a rating is required, but unrated bonds are also possible
Maturity	• Typically 2 to 10 years	• Typically 3 to 15 years, but straight stand-alone investment grade bonds can also be in 20, 25 and 30 years issuances
Currency	• Any currency with Schuldscheindarlehen investor demand (typically EUR, USD, Swiss Franc, GBP and others)	• Often euro for Reg S-only bonds, but can also be other currency
Interest rate	• Fixed or floating	• Fixed or floating
Restructuring	• Bilateral negotiations; typically Schuldscheindarlehen holder committees; no special regulatory framework; usually no majority quotas for changes included in Schuldscheindarlehen documentation	• Bondholder meetings; regulatory framework for changing bond terms with quotas
Publicity	• Completely private, no reporting obligations, bilateral regular reporting to Schuldscheindarlehen investors based on terms of the Schuldscheindarlehen	• Typically listed, publicity requirements and internal capital markets compliance

12.4.3. Placement process

Similar to a bond process, the arranging bank advising the issuer approaches potential investors and, in so far as required, arranges calls or roadshow meetings with the issuer's management to discuss the specific circumstances of the issuance and the issuer's financial performance and business.

Unlike a private placement bond process, where bookbuilding and placement can take place within only several hours or generally within a few days, the Schuldscheindarlehen marketing and placement process can take significantly longer. Arrangers often need four to six weeks to market a Schuldscheindarlehen issuance and to allow potential investors to make an investment decision. The longer lead times are in part due to the different investor base and market practice for Schuldscheindarlehen.

For instance, German savings banks require lengthy internal analyses and committee approvals for investments.

12.4.4. Paying Agent and Registrar

Similar to a bond process, a paying agent is hired to pass as a link between the investors and the issuer for interest payments and payments of principal. In addition, due to the nature of Schuldscheindarlehen, which cannot be traded but can be assigned to third parties by the Schuldscheindarlehen investors, there is typically a registry for Schuldscheindarlehen investors in order for the paying agent to make the payments to the correct investor.

12.4.5. Setting the commercial terms and conditions, investor subscription and closing

Towards the end of the marketing phase, investors directly sign up to the Schuldscheindarlehen through a subscription declaration (*Zeichnungsbestätigung*) which states the maximum volume the investor is willing to purchase and the minimum interest rate. Legally it is the arranger which initially takes out the loan and then assigns tranches to the investors.

The arranger together with the issuer sets the key commercial terms including the final volume and interest rates for the Schuldscheindarlehen tranches.

Once all commercial terms have been set, the Schuldscheindarlehen loans are signed and, thereafter, closing via funds transfer is completed.

13. 144A INVESTMENT GRADE BONDS

13.1	Introduction	92
13.2	Rule 144A and Regulation S	92
13.3	Investor Base and Credit Ratings	93
13.4	Offering Terms and Conditions	93
13.5	Documentation	96
13.6	Due Diligence	97
13.7	144A Investment Grade Bond Timeline	99
13.8	Ongoing Requirements – Rule 12g3-2(b)	102
13.9	Stock Exchange Listing and the Prospectus Regulation	102

13.1 Introduction

The U.S. debt capital market is the deepest and largest debt market worldwide. Although many investment grade rated mid-cap and large European issuers generally rely on their European programs for their day-to-day debt capital needs, tapping the U.S. market via a combined global 144A bond issuance may be attractive for such issuers in several circumstances, including for:

- European investment grade rated issuers who have significant U.S. dollar funding needs. Such issuers can tap the U.S. markets via a U.S. dollar denominated 144A bond, for which there is significant demand by U.S. based investors.

  Under special circumstances, for instance when an issuer wants to sell bonds to a more diversified investor pool or for very large debt issuances, euro or other currency denominated investment grade bonds are also issued as 144A bonds. Additionally, when the Reg S bond market outside the United States is strained or otherwise limited, an issuance of non-U.S. dollar denominated investment grade bonds via a 144A/Reg S bond can be advisable to achieve the best possible pricing; or

- Non-investment grade rated issuers who wish to complete a high yield bond issuance above an issue volume of about €150 million, regardless of whether such bonds are issued in Euros, U.S. dollars or a different currency. The investor base for high yield bonds is typically a different one than for investment grade bonds and the European investor base for high yield bonds alone is generally considered to be too limited to allow for attractive pricings of larger high yield bonds. For more information on high yield bond offerings, see Chapter 14 "High Yield Bonds."

  144A investment grade bond issuances are the standard way for German and other European issuers to access the U.S. debt market. However, some European companies, in particular large banks, have set up SEC-registered debt issuance programs and some European companies have issued SEC-registered bonds. The SEC-registration process for bonds is, however, complex and not described in this chapter.

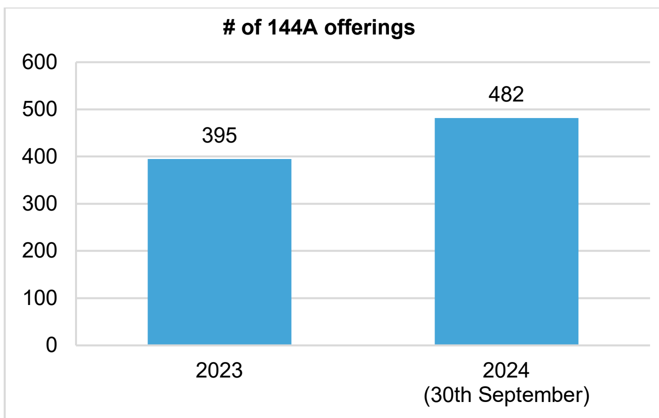
13.2 Rule 144A and Regulation S

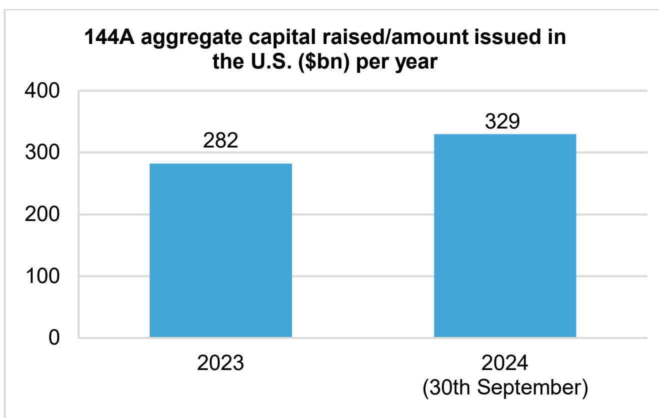
Securities issuances to the U.S. capital markets principally rely on Rule 144A, a safe harbor exemption to the registration requirements of the U.S. Securities Act. This rule allows for the resale of unregistered securities to persons or institutions that are reasonably believed to be qualified institutional buyers (QIBs). For investment grade bonds, this takes place as part of a two-step process, with the issuer first selling to one or more financial intermediary (initial purchasers/investment banks) on an exempt basis, who then resell the bonds to QIBs. Rule 144A requires that investors have ongoing access to reasonably current financial statements and other information about the issuer and/or guarantor of the bonds. Additionally, the bonds must not be fungible (*i.e.*, "mixable") with any securities already listed or quoted on a U.S. public market, for instance, the New York Stock Exchange.

Rule 144A was originally introduced by the SEC in 1990 to modify the holding period requirement on privately placed securities in order to allow QIBs to trade among themselves and to encourage foreign companies to sell securities in the U.S. market. Annually, several hundred billion dollars' worth of bonds are issued under Rule 144A, which has become the principal exemption to registration that foreign companies rely on when accessing U.S. capital markets.

Regulation S is the exemption relied upon to sell to non-U.S. investors outside of the United States. While it is possible to only sell a bond under Rule 144A without a simultaneous offer and sale to European and other investors outside of the United States under Regulation S, typically, to maximize investor demand, 144A offers by European issuers are combined with Reg S offers.

The following graphics show the total offering volume raised through Rule 144A issuances per year by capital raised and number of offerings (which predominantly consist of debt issuances, including by U.S. issuers):





13.3 Investor Base and Credit Ratings

A qualified institutional buyer (QIB) is a corporate entity that owns and invests, on a discretionary basis, at least $100 million in securities (or for a broker-dealer $10 million). Typical QIBs include certain registered broker-dealers, U.S.-regulated insurance companies, investment companies registered under the U.S. Investment Company Act of 1940 and certain employee benefit plans and trusts.

Credit ratings of the issuer or guarantor may be disclosed in the offering memorandum for 144A offerings and must be BBB- (S&P and Fitch)/Baa3 (Moody's) or higher to be considered investment grade.

13.4 Offering Terms and Conditions

The exact terms of the Rule 144A bonds are described in the terms and conditions, which are included in the offering memorandum and set out in the indenture and the actual notes.

A 144A/Reg S investment grade bond offering can include one or more tranches of bonds, each with different terms (floating or fixed rate interest, length of maturity, etc.) depending on an issuer's particular financing needs and market appetite.

144A investment grade bond offerings include substantially fewer covenants than high-yield bond offerings and also provide more flexibility to align the covenants with an issuer's requirements under other debt obligations, *e.g.*, covenants used in its European Reg S program.

Key covenants for 144A investment grade bonds are set out in the table below:

Term	Description	Remarks
Guarantee structure (if any)	outlines the obligations of the guarantor and specific structure the bonds are offered under	• guarantors can be the parent holding company and/or a subsidiary of the issuer
Interest rate and maturity	specifies fixed maturity date and amount (interest calculation) and time when interest on the bonds will be paid	• each tranche will be described separately
Credit rating	investment grade credit rating AAA to BBB- (S&P and Fitch) and Aaa to Baa3 (Moody's)	• exact credit rating will affect both pricing and inclusion of other covenants
Optional redemption	specifies when issuer can call all or any part of the bonds for redemption after a specified date, including any premiums or additional amounts that must be paid	• call date typically set at half the tenure of the notes • "make whole" premiums to be paid in addition to accrued interest vary but typically decline ratably to par over time
Change of control	grants further rights or options for redemption in the event of a change of control	• exact terms vary, depending on issuer and investors • put price is typically 101% of par (without any make-whole premium)
Modifications, supplements and waivers	outlines amendments which may be effected without the consent of the bondholders and amendments which require unanimous or majority consent by bondholders	• dependent upon issuer, terms of transaction and whether such modifications would have an adverse effect on bondholder rights
Negative pledge	Protects the bondholders from becoming disadvantaged by other debt of the issuer (or parent guarantor, etc.)	• typically includes various exclusions for, *e.g.*, asset backed securities
Liens	specifies limits on the amount of liens on consolidated total assets	• generally excludes liens incurred in the ordinary course of business • limit typically set at a certain percentage of consolidated total assets

Term	Description	Remarks
Mergers and consolidation	restriction on future mergers or consolidation to prevent business combinations unfavorable to investors (or requiring additional guarantees be put in place)	• exact terms vary depending on the issuer and its business • may also apply to material future acquisitions
Sale of assets	restriction on the disposal of company or group assets	• disposition in the ordinary course of business for fair market value generally excluded up to a certain value or percentage of total company assets
Events of default	include various, market standard, events of default such as non-payment of interest and principal (with applicable grace periods), commencement of insolvency proceedings and, potentially, cross-defaults	• grace periods may also exist for cross-default provisions and are typically tied to a certain threshold; can vary based on issuer's market standing

13.5 Documentation

13.5.1. Offering memorandum

The offering memorandum provides investors with detailed information about the issuer and/or guarantor, the offering and the terms of the securities being offered. Information typically disclosed in a Rule 144A debt offering memorandum differs little compared to a prospectus selling equity securities to institutional investors and/or the public. While Rule 144A does not require bond disclosure documents to contain any specific information, the offering memorandum for investment grade bonds typically contains the following sections:

- **risk factors**, providing a summary of key business and market risks and risks specific to the bonds;
- **business description**, providing details of the issuer and/or guarantor's business units, its strategy, key business data for preceding fiscal years and material agreements or litigation in addition to recent developments that are of material importance;
- **MD&A**, providing a narrative analysis of the issuer and/or guarantor's income statement, liquidity and capital resources developments for the preceding fiscal years and any interim periods;
- **T&Cs**, detailing the exact terms of the bonds offered (see offering terms above);
- **use of proceeds**, describing the intended use of funds from the sale of the bonds;
- **management and related-party transactions**, describing the issuer and/or guarantor's management, executive compensation arrangements and related-party transactions;
- tax disclosure, resale and transfer restrictions of the bonds and other technical disclosure; and
- the issuer and/or guarantor's audited **financial statements** for the three preceding fiscal years (or two preceding fiscal years for an emerging growth company) and unaudited (but reviewed) financial statements for any interim periods.

Depending on the issuer's existing public disclosure and its market standing as well as the marketing approach of the advising investment banks, public issuers may significantly reduce the length of the offering memorandum by incorporating by reference sections from their most recent annual reports and interim reports. This approach can reduce or eliminate the need to draft a bond- specific business description, MD&A or management and related- party transactions sections. As a result, the required work by the issuer on the offering memorandum can be significantly reduced.

There will usually be a preliminary offering memorandum and a final offering memorandum. The preliminary offering memorandum is used during the marketing period (also called a "red herring" because of the red legend which appears on the cover cautioning investors that it remains subject to completion). The final offering memorandum is substantially the same as the preliminary offering memorandum but includes the pricing information, determined following the investor roadshow.

Any material changes or events that occur during the marketing period may necessitate the preparation of a revised preliminary offering memorandum or a supplement. The offering memorandum is often sent to a financial printer to be typeset and provided in print or electronic form to investors.

13.5.2. Purchase agreement

The issuer and/or parent guarantor and the initial purchasers enter into a so-called purchase agreement (in Reg S bond deals, the agreement is typically called a subscription agreement or underwriting agreement or, for programs, a dealer agreement), which governs the terms of the banks' purchase of the bonds for further resale to QIBs under Rule 144A (or offshore in reliance on Regulation S). The purchase agreement typically contains, among other provisions, representations and warranties by the issuer/guarantor, confirming the accuracy of the information in the offering memorandum and related indemnity provisions, terms governing the mechanics of the purchase and sale of the bonds, closing conditions (including the receipt of legal opinions, officers' certificates, comfort /ratings letters and other documents) and termination rights.

13.5.3. Fiscal agency agreement/indenture

The issuer and/or guarantor and the fiscal agent/trustee enter into an indenture (also called an agency agreement), which governs the issuer's relationship with the bond holders and includes forms of the actual global notes and the terms and conditions of the bonds.

13.5.4. Comfort letter

The issuer and/or parent guarantor's accountants deliver a comfort letter to the initial purchasers confirming the financial figures stated in the offering memorandum and accompanying financial statements and confirming that there have not otherwise been any adverse financial developments. SAS 72 Comfort letters (U.S. standard) would be expected to be provided at pricing and at closing (in the form of a bring-down comfort letter).

The last reviewed quarterly financial statements or audited year-end financial statements may not be older than 135 days for auditors to deliver to the initial purchasers a comfort letter and negative assurance that there have not been any adverse financial developments. Initial purchasers will typically only agree to participate in an offering if they receive such negative assurance.

13.5.5. Disclosure Letters and Legal Opinions

The issuer's and/or guarantor's and initial purchasers' respective legal counsel deliver to the initial purchasers customary (i) disclosure letters (also called 10b-5 letters) confirming that the disclosure in the offering memorandum is not materially misleading or incomplete and (ii) legal opinions confirming no registration requirement under U.S. law, the validity and enforceability of the securities and certain other matters.

The issuer and/or guarantor's in-house counsel may be called on to deliver certain additional opinions (*e.g.*, regarding the issuer's valid existence and authority, authorization of the securities and operative agreements, no consents, absence of material legal proceedings, etc.).

13.5.6. Officer's certificates

The issuer and/or guarantor's officers will typically deliver certificates at launch, pricing and closing, confirming the accuracy of representations and warranties and the absence of a material adverse change or ratings downgrade. If the offering memorandum includes key financial information or metrics that the auditors are not able to cover in the comfort letters, the chief financial officer of the issuer/guarantor may also be required to provide a CFO certificate confirming the accuracy of such figures.

13.5.7. Choice of law

The standard choice of law for 144A bonds and related agreements is New York law. In principle, the underlying documentation could also be governed by English law, which certain large European issuers have chosen in the past and which has been accepted by U.S. institutional investors. The choice of German law is technically possible, but is generally seen as an unknown variable for U.S. institutional investors, which can result in a pricing penalty due to a perceived higher risk and uncertainty. U.S. investment grade bond investors prefer New York law as it, from their viewpoint, is the most predictable, with well-established case law in the U.S. regarding the interpretation of 144A bond terms.

13.6 Due Diligence

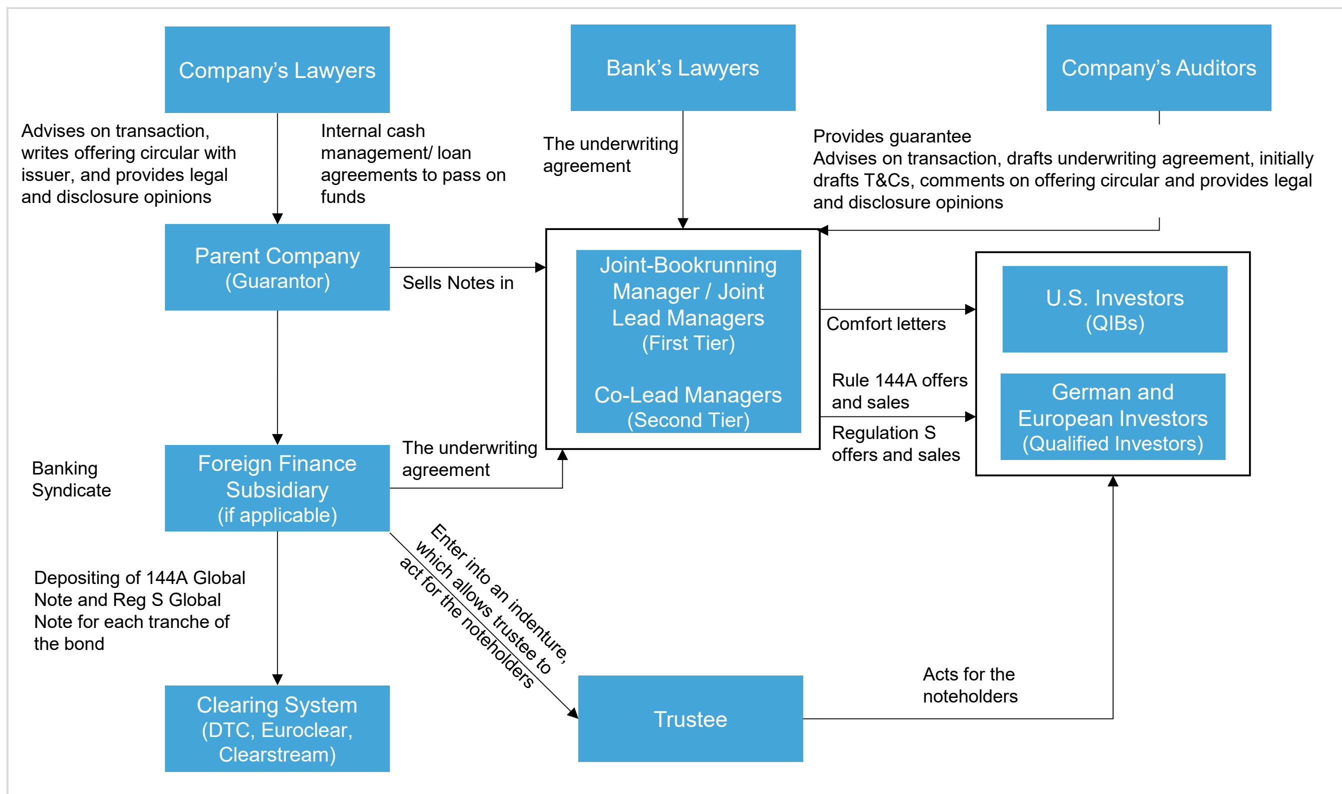
Because of the potential liability for false and misleading information in the offering memorandum under U.S. securities laws, certain steps must be taken to establish a so-called "due diligence" defense from such liability. These steps include a reasonable investigation regarding the issuer's and/or guarantor's business, financial position and prospects and any major risks it may be exposed to in order to confirm the accuracy and adequacy of the information that is to be provided to investors. The due diligence process in a 144A offering typically consists of the following three areas:

- **Management due diligence:** initial purchasers and issuer's/guarantor's counsel will require access to senior management in order to ask questions about various aspects of the issuer's/guarantor's strategy, business, finances, outlook/trends and risk management. This due diligence is concentrated at the beginning of the 144A process, when the offering memorandum and other materials are being drafted and the end of the offering period (so-called "bring-down" due diligence, to ensure the absence of material changes that may otherwise need to be described or disclosed to investors).

- **Documentary due diligence:** legal advisers will provide the issuer and/or guarantor with a document request list indicating the types of documents that need to be reviewed and that the issuer should upload to the electronic dataroom or otherwise provide. The documents typically range from board minutes and charter documents to material contracts and documents relating to regulatory matters and material litigation of the issuer and/or guarantor and its significant subsidiaries for the past three years.

- **Auditor due diligence:** The issuer and/or guarantor's auditors provide the initial purchasers with a comfort letter covering the financial statements and most of the financial figures contained in the offering memorandum. Initial purchasers would expect to have a due diligence call with the auditors to address questions in relation to their audit of the parent company's group and its internal controls.

This due diligence process also enables legal counsel to deliver their 10b-5 disclosure letters, which the initial purchasers generally consider to be an essential feature in establishing their due diligence defense.



13.7 144A Investment Grade Bond Timeline

A typical first-time issuance process requires approximately 10-15 weeks of preparation time, although this may vary depending on the terms of the transaction and the materials an issuer may already have available. Subsequent stand-alone 144A bond issuances, especially where an issuer has a good precedent offering memorandum draft and an electronic dataroom available for due diligence, can usually be completed in less time. The alternative to such stand-alone 144A issuances, which require time and effort on an issuance per issuance basis, is to set up a U.S. SEC-registered or unregistered bond program, which requires regular efforts to update required documentation, but which also allows the possibility of frequent issuances on an accelerated timeline.

Although exact timelines vary depending on the issuer and the nature of the transaction, an indicative timetable for a first time issuance of investment grade bonds under Rule144A is set out in the table below:

Term	Description	Tasks
Week 1	Initial coordination and discussions before kick-off meetings with lead initial purchasers; time of appointment of banks to be discussed	• Identify/appoint initial purchasers • Prepare due diligence request list for issuer; issuer to select dataroom service provider and begin preparing dataroom
Week 2	Initial organizational calls and kick-off meeting which will start the process for preparing the offering memorandum, purchase agreement and other operative documents	• Distribute working party list • Begin drafting operative documents • Circulate publicity guidelines • Populate dataroom
Week 3	Coordination of operative document drafting and clarification of disclosure/comfort requirements for auditors	• Circulate business and accounting due diligence questions
Week 4	Continue drafting operative documents and review of due diligence materials	• Appoint agents • Schedule business and auditor due diligence meetings/calls
Week 5	Discuss terms of draft offering memorandum, purchase agreement, fiscal and paying agent agreement and comfort letter and revise as necessary	• Circulate initial draft of offering memorandum/review and prepare comments • Circulate initial drafts of purchase agreement and indenture/review and prepare comments • Circulate draft comfort letters/review and prepare comments
Weeks 6-7	Continue review and discussion of documents and due diligence	• Draft legal opinions, officers' certificates, closing memorandum and other closing documents • Circulate comments to initial drafts
Weeks 8-9	Continue review and discussion of documents, including a possible drafting session. Conclude initial due diligence and provide any follow-up requests or clarifications	• Circulate revised draft documents • Circulate due diligence follow-ups

Term	Description	Tasks
Week 10	Coordinate final comments and draft documents and finalize due diligence review	• Prepare DTC submission and questionnaire • Update dataroom with any supplemental documents • Comment on draft documents
Week 11	Finalization of operative documents and closing documents	• Circulate offering memorandum for final approval • Final comments on purchase agreement, comfort letters, fiscal and paying agent agreement and other pricing and closing documents • Bring in additional initial purchasers and execute engagement letters
Weeks 12-13 **(Launch/ Pricing)**	Announcement of transaction to market and roadshow (length varies depending on transaction) with pricing to follow	• Conduct pre-announcement bring-down due diligence call • Final offering memorandum • Auditors deliver executed comfort letters • Execute purchase agreement • Agree pricing terms
Final Week (Closing/ Settlement)	Finalization of transaction	• Distribute final terms • Final (signed) closing documents, bring-down comfort letter and global notes delivered • Net proceeds paid to issuer • Notes released through clearing system

13.8 Ongoing Requirements – Rule 12g3-2(b)

A Rule 144A bond issuance does not require any filings with the SEC or impose any ongoing reporting obligations on the issuer and/or guarantor other than requirements under Rule 12g3-2(b) under the Exchange Act. To qualify for the Rule 12g3-2(b) exemption, the issuer and/or guarantor principally needs to publish its annual report, interim reports and certain press releases on its website in English. Many large European companies already comply with the requirements of the Rule 12g3-2(b) exemption. All information published pursuant to Rule 12g3-2(b) results in potential liability under Rule 10b-5 for fraudulent misstatements or omissions contained in the information published (for more information on potential liability issues see, Chapter 16 "*Liability in Securities Offerings*").

13.9 Stock Exchange Listing and the Prospectus Regulation

Generally, an offering of the bonds to European investors would not require a Prospectus Regulation compliant prospectus, as long as an appropriate exemption is available. An offering is exempt if, for example, the denomination of the bonds is at least €100,000 or if the issuance is in U.S. dollars; market practice is to use a denomination of $200,000.

A listing of the bonds in the U.S. would trigger SEC registration requirements. Rule 144A bonds are not required to be listed on a stock exchange in the U.S. or elsewhere. A well-functioning OTC in the U.S., which QIBs use to trade 144A bonds among themselves, generally makes a listing unnecessary for investor liquidity purposes.

A listing on a European stock exchange (*e.g.*, the Luxembourg Stock Exchange or Irish Stock Exchange) may be desirable for a variety of reasons. A listing of bonds on an unregulated market in the European Union is possible without having to comply with the Prospectus Regulation. European stock exchanges generally accept an offering memorandum drafted according to U.S. standards as the basis for trading on their unregulated Euro MTF market. Such listings are usually a straightforward process.

14. HIGH YIELD BONDS

14.1 Introduction 104

14.2 Reasons for High Yield Offerings 105

14.3 Key commercial terms 105

14.4 Intercreditor Agreement 106

14.5 Structuring 107

14.6 High Yield Documentation and Due Diligence 108

14.7 Engagement letter and purchase agreement 109

14.8 Terms and Conditions 109

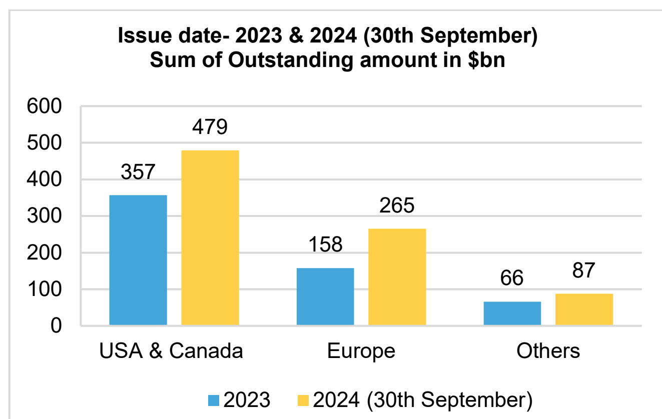
14.9 High Yield Bond Timeline 112

14.10 Mittelstandsanleihen 112

14.1 Introduction

The high yield 144A/Reg S bond market, together with the leveraged loan financing market, constitutes the primary source of acquisition finance for European issuers. In addition, various other highly leveraged companies, either due to a previous acquisition or for other reasons, rely on the high yield bond and leveraged loan markets for debt financing.

Unlike in the United States, high yield bond issuances in Europe are a comparatively recent mass phenomenon, with leveraged loan financing the historically predominant financing tool for highly leveraged financing. In 2005, the overall global high yield bond market was concentrated around U.S. issuers, with close to 90% of the U.S.$ 700 billion high yield bonds outstanding at that point being issued by U.S. companies. By 2015, the global high yield bond market had tripled to U.S.$ 2.2 trillion and has also diversified in terms of issuers. While still 62% of the overall volume of high yield bonds outstanding in 2015 were issued by U.S. companies, 21% of the high yield bonds outstanding were issued by European issuers and 17% by issuers from the rest of the world (in particular, Asian companies). This trend continued over the years till 2022, with 52 % of high yield bonds outstanding issued by U.S. companies, while 29 % were issued by European issuers and 18 % were issued by issuers from the rest of the world.



The high yield bond market is a much smaller sub-segment of the overall corporate debt market compared to the investment grade bond offering volume and debt outstanding. It includes a different type of investor base with a different type of risk appetite and portfolio strategy. Due to the specific risk profile of high yield issuers, the high yield market generally correlates more with equity markets than straight debt markets.

Because a large part of the investor base for high yield bonds is located in the U.S., issuances of more than €150 million are often issued according to U.S. market standards, in 144A/Reg S high yield bond transactions (or sometimes Reg S-only transactions), and are predominantly governed by New York law. The process of issuing smaller transactions by German or European issuers which are placed to the Reg S bond market only can be split into the following two categories:

- High yield issuances which principally follow the approach outlined in this chapter, *i.e.*, the U.S. market practice including the drafting of an offering circular and U.S. standard terms and conditions. This approach helps facilitate interest from larger investors, who are used to the U.S. high yield issuance processes and standards.
- Issuances of smaller bonds, most notably as part of the German so-called "Mittelstandsanleihen"-market, which do not follow the U.S. market practice but provide more limited prospectus disclosure and terms and conditions based on precedents used in the Mittelstandsanleihen market.

The categorization of "high yield bonds" refers to the issuers' credit rating. Non-investment grade ratings range from BB+ and below for S&P and Fitch and Ba1 and below for Moody's. Interest rates on high yield bonds as of 2024 typically range from 5% to 11%, thus offering a higher yield for investors than traditional investment grade bonds. While high interest rates reward bondholders for their investments, investors in high yield bonds also require compliance with an extensive set of covenants. Such customary, tailored and evolving (depending on market conditions) packages of covenants are required as additional protection for bondholders and are the key added complexity which differentiates high yield bonds from most other capital market instruments.

14.2 Reasons for High Yield Offerings

Investment grade bonds are predominantly issued for refinancing needs or to support a company's growth. Large public European companies today typically finance most of their debt capital needs via the investment grade Reg S bond market, or, if they are active globally, through issuances of investment grade bonds in other markets. Bank loans for mid-cap and large-cap investment grade issuers have become increasingly less important in recent years.

The high yield bond market is, in contrast, more diverse and is utilized for several different situations, such as:

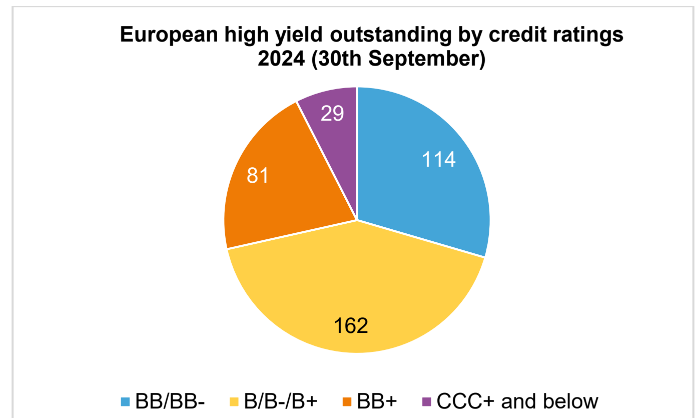
- **Acquisition finance:** issuers, principally private equity companies, can use the leveraged finance market to refinance acquisitions for their portfolio via a single or multi-tranche high yield bond and a super senior revolving credit facility or as a combined financing strategy with a high yield bond issuance alongside leveraged loan facilities.
- **Leveraged buy-outs (LBO):** High yield bonds can be used to finance an LBO.
- **Refinancing:** Refinancing of existing bonds or bank debt make up about half of the high yield bond issuances in Europe. Refinancings do not only include the refinancing of existing high yield bonds with a new high yield bond but also of parts or the entire bank, mezzanine, investment grade bond or other loan structure. Issuers which have formerly been investment grade bond issuers and subsequently fall to a sub-investment grade rating are also among high yield issues.
- **Other reasons:** Other reasons include high yield bond issuances to effect dividend payments or the reduction of shareholder financing or buybacks of stock.

14.3 Key commercial terms

14.3.1. Credit Rating

The covenant package and the marketability of a high yield bond is, in large part, dependent on which rating category a group falls into. However, investors typically generate their own models to assess the risk of a group and only rely on credit ratings for an initial categorization.

Generally, the majority of European high yield bond issuances are rated BB+ to BB-, which are the top non-investment grade ratings. The following chart shows the split in 2024 (until September 30) of all European high yield outstanding by credit rating:



14.3.2. Maturity

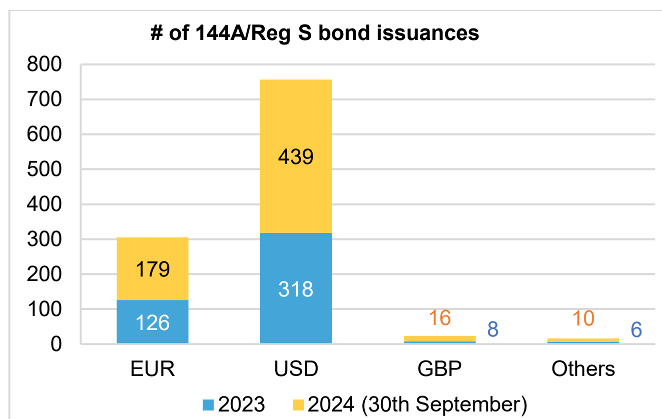
Average tenor for high yield bonds tends to be relatively long compared to investment grade bonds, with a typical maturity between 5 and 10 years.

14.3.3. Fixed vs. floating interest rates

The overwhelming majority of high yield bonds issued by European issuers have been fixed rate tranches, with only a limited number of floating rate issuances. This is partially caused by high yield investor interest in fixed rate instruments and also by the overall debt structure of a group – if a high yield bond is combined with bank financing, the bank financing is often floating rate.

14.3.4. Currency

Unlike 144A/Reg S investment grade bonds issued by European issuers, which are typically denominated in U.S. dollars, more than half of recent high yield 144A/Reg S bond issuances have been euro denominated, with U.S. dollar issuances being the second most prominent and a small minority of issuances denominated in British pound sterling and certain other currencies.



14.3.5. Denomination

Similar to 144A/Reg S investment grade bond issuances, the minimum denomination or issuance quantity per investor for high yield bonds is typically €100,000 (usually with subsequent increments of €1,000) to take advantage of the exemption from an approved prospectus requirement in Europe.

14.3.6. Offering volume

The issuance volume can vary widely, but typically ranges from €150 million to €1 billion and above, with average volumes per issuance fluctuating between approximately €300 million and €600 million for the past several years.

14.3.7. Tranches

Like a 144A investment grade bond offering, a high-yield 144A bond offering can include one or more tranches of bonds, each with different terms (floating or fixed rate interest, length of maturity, etc.).

14.4 Intercreditor Agreement

Due to the increased default risks of issuers with lower credit ratings compared to investment grade issuers, bank lenders and bondholders often require the relationship between an issuer's debt instruments to be governed in a so-called intercreditor agreement. An intercreditor agreement contractually defines the ranking between various debt instruments as well as other relationships.

Unlike in issuances of investment grade bonds, particular care has to be taken to align the covenant package of a high yield issuer's bonds with the terms of its credit facility or facilities that make up part of its overall debt structure. While there are key differences between loan covenants and bond covenants, non-alignment can cause significant problems on a day-to-day operating basis for a group, as certain actions might be allowed by the bond, but problematic under the credit facilities agreement, or *vice versa*.

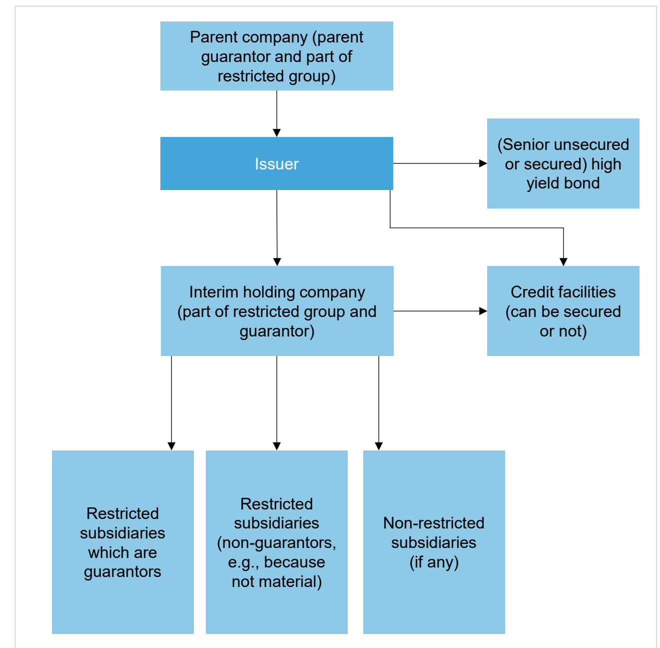
Europe has seen increased market competition between the utilization of high yield bonds versus leveraged loans. High yield bonds can, in good market conditions, provide an issuer with better commercial pricing. In practice, during periods of high or low liquidity in the banking sector and high or low market volatility for high yield bonds, one instrument can be favoured over the other.

14.5 Structuring

An important component of a high yield bond issuance is the "structuring" of the issuance. Structuring is important to govern the structural ranking of different lenders. Bondholders are typically ranked structurally junior to (certain types) of bank lenders or, to some extent, *pari passu*:

- **Structural subordination:** depending on which entity within a group issues a bond, the bondholders can be either "structurally subordinated" or included on the same level as other key lenders, such as banks. In rare cases, bondholders may also be "structurally senior" to other lenders. Next to guarantee structures and contractual agreements on ranking between different creditors, structural subordination governs which lenders receive assets first in an insolvency or restructuring scenario.
- **Security:** high yield bonds can be secured, with liens on assets of the group, or unsecured. If a high yield bond is issued as a secured bond, other bank lenders typically also receive the same security.
- **Guarantees:** Unlike investment grade bond issuances, high yield bonds often include so-called "upstream" guarantees by direct or indirect subsidiaries of the issuer and, if the issuer is not the parent company of the group, parent guarantees of the ultimate parent company may also be included as part of the structuring. These guarantees allow bondholders to be preferential creditors at the level of those subsidiaries which hold substantial assets of the group. There are also types of high yield bonds which do not include upstream guarantees, which increases the risk for bondholders, such as for typical PIK (payment-in-kind) high yield bonds.
- **Restricted group:** High yield bonds typically restrict payments and actions to substantially all companies of a group at the time of issuance. However, depending on the structuring desired, certain group entities may be placed outside of the restricted group to allow for increased flexibility in relation to such unrestricted entities.

The structuring of the overall debt of a group with a high yield bond in the financing mix has a significant impact on the recovery rates of a bond and thus, depending on the overall default risk of a group, on the yield demanded by investors for a given bond issuance.



14.6 High Yield Documentation and Due Diligence

14.6.1. Offering circular/offering memorandum

The offering circular is the key disclosure document for a high yield bond process. Because many high yield issuers are private companies, extensive disclosure on an issuer's business and market usually has to be drafted "from scratch" and included in the offering circular. As such, the offering circular for a high yield 144A/Reg S bond in many respects includes similar details in disclosure as in an IPO prospectus.

In addition to such detailed business, market and risk factor disclosure, offering circulars for high yield bonds focus on the ability of the company to service the interest of the bonds and other debt financing instruments and its overall leverage ratio (*i.e.*, the ratio between (Adjusted) EBITDA, which is a measure of the cash the issuer can generate adjusted for one-off effects and extraordinary items, to net (senior) indebtedness).

These descriptions include details on planned investments, market forecasts and provide a historic description on the cash generating ability of the company.

The offering circular also includes a description of the terms and conditions of the bond.

14.6.2. Financial statements

An offering circular for a high yield bond issuer, as a matter of market practice, requires the inclusion of three years (plus interim period, if applicable) of consolidated and comparable financial statements of the group. Financial statements can be IFRS statements but also local accounting standards (in Germany HGB).

This is particularly problematic if the group has been acquired recently or has acquired large assets itself. In such acquisition scenarios, significant efforts and analysis needs to be conducted to create such financial statements, often in a relatively short period of time.

14.6.3. Trust indenture

The indenture is the legal document governing the bond issuance, which includes the notes and the legally binding terms and conditions. Even though the indenture is the legally binding document, the terms and conditions included in the offering circular are drafted and negotiated first in the process. The indenture is typically drafted as a "technical document" at the end of the process and principally includes a copy of the negotiated terms and conditions included in the offering circular.

14.6.4. Intercreditor agreement

While investment grade bonds typically include no financial covenants and very limited other restrictions for the overall business of an issuer (principally due to the low likelihood of an insolvency or restructuring situation), such covenants are key for a high yield issuance. Additionally, in the leveraged finance market, high yield bonds and leveraged loans are much more tightly connected and often used in combination. As such, it is market practice to draft an intercreditor agreement in connection with a high yield bond issuance that governs the relationship between the different bank lenders (or derivative instruments) as well as the bondholders.

14.6.5. Due diligence

The due diligence process for a high yield bond issuance is substantially similar to the process outlined in the previous section on 144A investment grade bond issuances and for IPOs involving sales to U.S. investors. The issuer typically creates an electronic dataroom for key documents of the last three fiscal years and the year of the proposed issuance, which can then be accessed by lawyers and bankers. In addition, the advising investment banks will conduct management due diligence sessions and legal counsel will potentially set up specific due diligence calls with the issuer's representatives regarding tax, sanctions and anti-money laundering compliance, regulatory matters and litigation.

Due to the often fast-track nature of a high yield bond issuance, the due diligence process can result in a bottleneck in the timeline if not correctly managed and set up at the beginning of the process.

14.6.6. Legal opinions, disclosure letters and comfort letters

Similar to other 144A processes, U.S. disclosure letters and comfort letters relating to the offering circular are issued by the respective legal and audit teams advising on a high yield bond process. The due diligence conducted by the lawyers is a prerequisite for a U.S. disclosure letter, which confirms that nothing has come to that particular legal counsel's attention which would make statements in the offering circular misleading or incorrect. The comfort letter, provided by the issuer's auditors, relates to accounting numbers in the offering circular as well as the included consolidated financial statements.

144A/Reg S high yield bonds and related documentation are typically governed by New York law. As a result, U.S. legal opinions relating to the documentation are also issued by U.S. lawyers, supplemented by local law opinions such as German law opinions relating to German law aspects of the transaction.

14.7 Engagement letter and purchase agreement

At the beginning of a high yield bond issuance, the issuer and the mandated banks will agree on an engagement letter, setting out the key economic principles of the banks' engagement and the transaction.

The principle agreement between the banks and the issuer is the purchase agreement, which is the equivalent to an underwriting agreement in an IPO or a subscription agreement in other debt transactions. The purchase agreement includes representations and warranties which are partially tailored to the specific issuer, a market standard indemnity provision, termination rights and also describes the key economics and technical aspects of the bond issuance.

14.8 Terms and Conditions

The complexity of a high yield 144A/Reg S bond offering principally stems from the terms and conditions and the covenant package negotiated for the bonds. The description of such covenants (known as the "Description of Notes" or DoN) in the offering circular can be 80-100 pages and longer, compared to the usual 10 to 20 pages for investment grade bonds. These covenant packages have evolved over time due to market practice and principally try to restrict the issuer of the bond from engaging in activities that could increase its risk profile, while still allowing the issuer to engage in day to day business and transactions that benefit the overall group, even if – on paper – such transactions may increase the risk profile.

Conceptually, the terms and conditions in a 144A/Reg S bond offering can be divided into two categories: (i) terms which are also usually included in principally the same way as in a 144A/ Reg S investment grade bond and/or a Reg S-only bond and (ii) a large number of high yield specific terms or modifications of investment grade bond terms.

Standard terms which are typically in both investment grade bonds and high yield bonds include negative pledge clauses, change of control clauses or standard events of defaults.

The following table outlines terms typically seen in high yield bonds:

Term	Description	Remarks
reporting	in many cases high yield bond issuers do not have shares or other instruments listed on a market which require the regular disclosure of financial reports – the bond terms and conditions include reporting requirements to bondholders	• typically includes quarterly reporting (often with a specially drafted MD&A) and investor calls in addition to reports of default and period compliance/officers' certificates
restricted group	limitation on activities of the issuer and, potentially, its parent and all material subsidiaries, with certain exceptions, particularly relating to the sale of capital stock of a restricted entity and payments	• covenants in the indenture usually apply to enumerated restricted subsidiaries (even if such subsidiaries are not party to the indenture)
parent and subsidiary guarantees	minimizes structural subordination by requiring the guarantee of each restricted subsidiary	• helps preserve structure
anti-layering	for senior subordinated bonds, an anti-layering covenant prohibits the issuance of debt which is ranked above the senior subordinated bond but junior to the senior debt (*e.g.*, bank debt)	• helps preserve structure
limitations on liens (negative pledge)	limits the ability of an issuer to provide security for (new) debt	• helps to preserve the risk profile of the bondholders; also typical in investment grade bonds
exceptions from the negative pledge	due to the typically complicated overall debt structure of a high yield issuer, high yield bonds include more extensive exceptions from the negative pledge, including allowing liens on senior credit facilities, acquired businesses or to secure certain "permitted secured debt"	• unlike investment grade bonds, the exceptions to the negative pledge are particularly important as the overall debt structure is generally more complex
restricted payments	prevents cash and assets from leaving the consolidated group through payments of dividends, redemption of common stock, fulfillment of other obligations which are subordinate to the notes, or investments in affiliates, joint ventures or other companies that are less than majority owned	• availability for making payments despite restricted payment covenant can increase over time • various permitted restricted payments or permitted investments are typically included to allow certain transactions
transactions with affiliates	limits transactions with affiliates to arm's-length transactions to ensure that all transactions are priced appropriately and value is not transferred out of the group or structured around restricted payments covenant	• may require board approval and/or fairness opinions from independent advisors

Term	Description	Remarks
dividends and other payment restrictions affecting subsidiaries	limits subsidiary dividends to ensure that the cash generated by restricted subsidiaries can flow up to the issuer for payment of the notes, unencumbered by limitations in other agreements other than those imposed by law or other routine limitations	• important for an issuer that is a holding company or otherwise has significant operations at its subsidiaries
indebtedness	limits the incurrence of additional debt unless cash flow is sufficient to service all debt, including any proposed new debt; because of the "incurrence" test, unlike in a bank facility covenant, a bond financial covenant can technically be violated without triggering a covenant breach under the bond, which is a significant advantage of a bond	• leverage ratio (typically debt to EBITDA for the last 12 months) and coverage ratio (typically EBITDA for the last 12 months to interest expense) • indebtedness incurrence is arguably the most important covenant in high yield bonds and typically includes various "baskets", *i.e.*, exceptions that allow for particular additional debt incurrence, such as a working capital basket or ordinary course of business debt
sale/leaseback transactions	control of sale/leaseback transactions (an issuer sells an asset to another entity and then leases the asset back from the acquiring entity) as economically these transactions are similar to secured financings	• must apply proceeds in accordance with asset sale covenant
redemption/premium call provisions	unlike investment grade bonds, high yield bonds are often redeemed early with a premium call feature typically included in the terms along with a "make-whole" redemption feature	• redemption provisions include special redemptions in connection with a future IPO (so-called "equity clawback") or redemptions after a certain non-call period at a fixed purchase price (*e.g.*, a bond issued in 2024 may allow redemption at 106% after 2027, 104% after 2029, etc.) • alternatively or combined with a premium redemption feature, a "make-whole" redemption similar to investment grade bond terms can be included
change of control	similar to investment grade bonds, these covenants provide bondholders an option to accept redemption in the event of a change of control	• change of control typically occurs if a person, directly or indirectly, acquires more than 50% of the voting power in the common stock of the issuer • a change of control event gives the bondholders the option to accept redemption (typically at 101%)

14.9 High Yield Bond Timeline

The process and necessary steps for 144A high yield bond issuances are (to some extent) similar to those outlined in the timeline for 144A investment grade bond issuances. However, high yield issuances are often completed on an accelerated timeline, particularly when the proceeds from the issuance are needed for acquisition financing or other instances where the funds must be accessed by an issuer in the near future. In exceptional cases, a high yield bond can also be issued as a Reg S-only bond, but the documentation and process would still look fairly similar (including the DoN) to a 144A/Reg S high yield bond.

In addition, the requirement to arrange for collateral for a secured bond and the parallel negotiation of a new or altered bank credit facility and/or revolving credit facility can add significant complexity and increase workloads to the overall timeline. Further, in scenarios in which the high yield bond is part of or is the primary instrument of an acquisition finance structure, the bond issuance must be coordinated and aligned with the acquisition closing timeline.

Depending on time constraints, the high yield bond issuance process can be as fast as 4-5 weeks between start of the project and launch of the bond or, in certain circumstances, may require 3 months or longer, similar to a 144A/Reg S investment grade bond issuance.

14.10 Mittelstandsanleihen

The process of issuing a high yield bond explained in this chapter relates to the U.S. market practice which applies to high yield bonds sold to European and U.S. investors, but also to certain larger issuances of high yield bonds only sold to European investors.

Starting in about 2010 and with a boom in issuances in the years 2011 to 2013, a market for Reg S high yield bonds tailored to German "Mittelstand"-companies and comparable foreign companies developed in Germany. These high yield bonds are typically issued in sizes between €15 million and €150 million, with denominations of €1,000 and marketed to German and European investors, including retail investors seeking higher yields than in investment grade issuances.

The market for Mittelstandsanleihen differs significantly from the issuance characteristics for a high yield bond issued using U.S. market standards, most notably:

- The terms and conditions of a Mittelstandsanleihe are significantly less complicated than the U.S. market standard and tend to follow the style of terms and conditions of investment grade bonds. Some of the concepts developed in the U.S. high yield market have, however, been also transferred to the market for Mittelstandsanleihen, such as financial covenants or restricted payments covenants.
- Unlike U.S. market standard high-yield bonds, which are not marketed to retail investors, Mittelstandsanleihen are typically sold with a denomination of €1,000 and listed on a German exchange such as the Scale segment of the Frankfurt Stock Exchange, thus also targeting retail investors.
- Because it often includes retail investors and/or listing on an exchange, the issuance of Mittelstandsanleihen involves drafting a prospectus according to the standards of the EU Prospectus Regulation. However, a prospectus for a Mittelstandsanleihe is generally significantly less comprehensive in its disclosure than those used for standard U.S. high-yield bonds but follows the standard for investment grade bonds.
- Often, no comfort letter or disclosure letters are used for the issuance of a Mittelstandsanleihe, reducing lawyers' costs compared to standard U.S. high yield issuances.

The issuance process of a Mittelstandsanleihe generally follows the issuance process outlined in Chapter 8 "*Reg S Investment Grade Bonds*."

In recent years, the market for issuances of Mittelstandsanleihen has weakened in Germany, as a result of several prominent insolvencies of issuers. Issuers with a good track record and conservative ratings, however, continue to successfully place Mittelstandsanleihen.

15. U.S. PRIVATE PLACEMENTS (USPPS)

15.1 Introduction 114

15.2 NAIC private rating 114

15.3 Note purchase agreement 115

15.4 Terms and Conditions 115

15.5 Private placement memorandum 117

15.6 Bank and Legal Counsels' involvement 117

15.7 USPP Timing 117

15.8 Ongoing information requirements 117

15.1 Introduction

A U.S. private placement (USPP) is an offering of unregistered securities sold directly to U.S. investors by way of a note purchase agreement. The number of U.S. investors can range from a single investor (in rare cases) to several dozen. The USPP investor market is dominated by U.S. insurance companies and investment funds, but also includes pension funds and, to a small extent, certain other investors, including non-U.S. investors. However, unlike the general U.S. investor market with, *e.g.*, several thousand QIBs, the U.S. private placement market is significantly more concentrated, with a few dozen investors making up most of the investment volume.

Unlike in a standard bond offering, the issuer under a USPP transacts and negotiates terms directly with the investors instead of selling to an underwriting bank who then re-sells to a large number of investors. USPPs are thus structured similarly to German Schuldschein loans. There are, however, significant differences in the covenants, the issuance process and the technical and legal implications of a USPP.

USPPs are used both by U.S. issuers, which make up more than 50% of the market, and non-U.S. issuers. USPP demand has historically been of particular importance in the English speaking world, most notably for Australian, New Zealand, Canadian, British and Irish companies. French, Dutch, German and other European companies make up a smaller, but still significant share of the overall volume. Overall, the USPP market in 2022 amounted to approximately US $ 460 billion.

In Germany and other European countries, USPPs are of particular interest for mid-cap companies without a formal credit rating (usually privately held companies) that do not want to issue a public bond or would like to diversify their capital structure. The size of individual USPPs varies depending on the issuer. The typical issuance is, however, in a range of between U.S.$ 100 million and 300 million. Due to USPP investor flexibility in terms of maturity (3 years to 20+ years) and potential deal sizes (U.S.$ 75 million to U.S.$1.5 billion depending on the issuer and market condition) USPPs are sometimes also used by larger companies and public companies with public ratings as part of a diversification of their overall capital structure. USPPs have historically also been available to issuers during periods of financial turmoil, which also make them an attractive funding tool during market downturns when the market for public bonds and other capital markets instruments may be unattractive or unavailable.

The main drawbacks for a USPP issuer are (i) the relatively investor-friendly covenants compared to, *e.g.*, a Reg S (lower investment grade) bond, (ii) generally somewhat higher interest costs than in the general capital markets for a bond, (iii) the somewhat significant internal preparation work required for a USPP issuance compared to, *e.g.*, a Schuldscheindarlehen placement or a repeat bond placement, and (iv) difficult restructuring or covenant amendment process post-issuance, in particular for maintenance covenant changes. However, in addition to the previously mentioned advantages of USPPs, including issuance flexibility, investor base diversification and resilience during downturns, USPPs are completely private transactions and do not result in any follow-on regulatory exposure because notes issued in USPPs are not listed on any exchange.

While USPPs are generally denominated in U.S. dollars, in recent years, issuances in euro, Australian dollars, British pound sterling and other currencies have also increasingly taken place.

15.2 NAIC private rating

USPPs do not require formal credit ratings, but are generally only issued by companies which would qualify for an investment grade rating and are viewed as relatively low-risk investments.

USPP investors that are U.S. insurance companies require a private rating by the Securities Valuation Office of the National Association of Insurance Commissioners (NAIC).

Because a large percentage of investors in the USPP market are U.S. insurance companies, the availability of an NAIC rating can have a significant effect on the placement and pricing of notes offered in a given USPP. A rating of NAIC – 1 or NAIC – 2 is considered equivalent to an investment grade rating.

15.3 Note purchase agreement

The note purchase agreement (NPA) is the key operative legal document in a USPP. It outlines the exact terms of the transaction and is usually drafted using one of the standard forms maintained by the American College of Investment Counsel (for non-US issuers, this is usually Model Form X).

The NPA details the agreement between the issuer and the investors. It contains negotiated terms and conditions, including various covenants, depending on the issuer's rating and the size of the investment. Due to the use of standard forms as a starting point, USPPs generally follow the same structure and standard concepts, despite tailored negotiations and terms for a particular issuance. Historically, this has been one of the key features of strength of the USPP market. In contrast, Schuldscheindarlehen and other private placement documentation, such as that of the European private placement market established by French banks, have been, among the different arrangers, less standardized and suffer from a lack of market experience and time-tested terms of agreement (which can pose a certain amount of risk for both issuers and investors).

One additional key difference resulting from the private nature of a USPP compared to a (public) bond issuance is that amendments to the NPA are governed by U.S. contract law and usually require the consent of all U.S. investors for changes to key economic terms (maturity, interest, etc.).

This 100% requirement can make it hard to negotiate changes to covenants, for example in cases where there is a single "hold-out" investor who does not agree to a change.

15.4 Terms and Conditions

USPPs notes can be issued both as fixed or floating rate notes with maturities between 3 to 15 years, with some deals including long-term maturities of 20 years and more.

Due to the often long-term nature of USPP notes, the terms and conditions of USPPs include a significant number of protections and other various concepts, typically not included in a Reg S bond issue or a Schuldschein loan, including:

Term	Description	Remarks
capital maintenance	specification of certain capital resources that must be maintained (debt to equity ratio or maintenance of particular assets or liquidity levels)	• usually dependent on company rating
financial covenants	financial covenants are the key commercial covenant of a USPP and typically include one or two covenants relating to financial ratios or maintenance levels	• usually net debt to EBITDA, interest coverage and/or a minimum net worth covenant
additional debt covenants	specifies limits on the amount of additional debt that can be incurred (subsidiary or priority)	• limit typically set at a certain percentage of consolidated total assets (*i.e.*, not to exceed 10%) • dependent on guarantee structure
liens	limitation of liens on consolidated total assets	• generally excludes liens incurred in the ordinary course of business • limit typically set at a certain percentage of consolidated total assets
mergers and consolidation	restriction on future mergers or consolidation specifying investors may not be negatively affected (or additional guarantees put in place)	• exact terms vary • may also apply to material future acquisitions
change of control	grants further rights or options for redemption in the event of a change of control	• exact terms vary, depending on issuer and investors
redemption at the option of the issuer	Provides an early repayment option to the issuer, which, however, unlike in early prepayment options for other financing instruments, is often prohibitively expensive	• only possible at a significant "make-whole" amount calculated based on future interest payments or otherwise taking into account future payments
sale of assets	restriction on the disposal of company or group assets	• disposition in the ordinary course of business for fair market value generally excluded up to a certain value or percentage of total company assets
governing law	law governing the NPA and securities	• New York law is often chosen in the context of USPPs (and part of the model NPA), but local law (such as German law for a German issuer) is increasingly accepted

15.5 Private placement memorandum

Potential investors are often also provided with a private placement memorandum (PPM) or other offering document which outlines the objectives, risks and proposed terms of investment involved in the USPP. Although such a document is not a prospectus for U.S. securities law purposes, the issuer represents in the NPA that the information contained therein is true and complete. Other information that is useful in evaluating the offering, such as financial statements, information regarding the management of the issuer and a description of the issuer's business may also be provided in the PPM.

15.6 Bank and Legal Counsels' involvement

For most European USPPs in which an arranging investment bank is involved, the bank(s) and investors' counsel will prepare the terms and conditions and issuer's counsel will prepare the PPM in cooperation with the issuer.

Depending on the exact transaction characteristics, other standard documentation typically includes legal opinions, confirming that the securities offered are exempt from the registration requirements of the Securities Act and investor letters, in which investors acknowledge the extent of the information that has been provided by the issuer and confirm that they are financially sophisticated and able to independently assess the merits and risks of the agreed investment.

15.7 USPP Timing

As a general rule, USPPs are carried out on a relatively quick timeline, usually lasting from eight to twelve weeks in total (although this may vary depending on the exact terms of the deal). Generally, the transaction timeline and documentation consist of the following phases:

15.7.1. Launch: (week 1) identify bank(s) arranging the USPP

During this phase, investors are usually unknown and in a large transaction will be identified by the banks that are ultimately selected by the issuer. The advising bank will draft a term sheet based on its experience in previous transactions that proposes the basic transaction terms and present these terms to investors. Based on this input and market reaction, the terms of the USPP will be decided and reflected in the NPA.

15.7.2. Advising bank due diligence and documentation

Issuers' counsel will begin drafting the PPM and other required documentation, including finalizing the terms and conditions outlined in the NPA with investors' counsel. The selected advising bank will conduct its own due diligence on the issuer to determine potential weak spots or problem areas, which will then be further discussed and potentially addressed in the PPM and NPA.

15.7.3. Launch of transaction and investor interaction

Once the PPM and the draft NPA are ready, investors who have been identified by the company and the bank, together with their counsel and (if applicable) counsel for the investors, will perform due diligence of company materials, including participating in due diligence telephone conferences with management or, potentially, meetings with management as part of a physical roadshow for larger deals or first time issuers.

Legal counsel will also review existing credit agreements in order to determine any necessary amendment procedures that must happen.

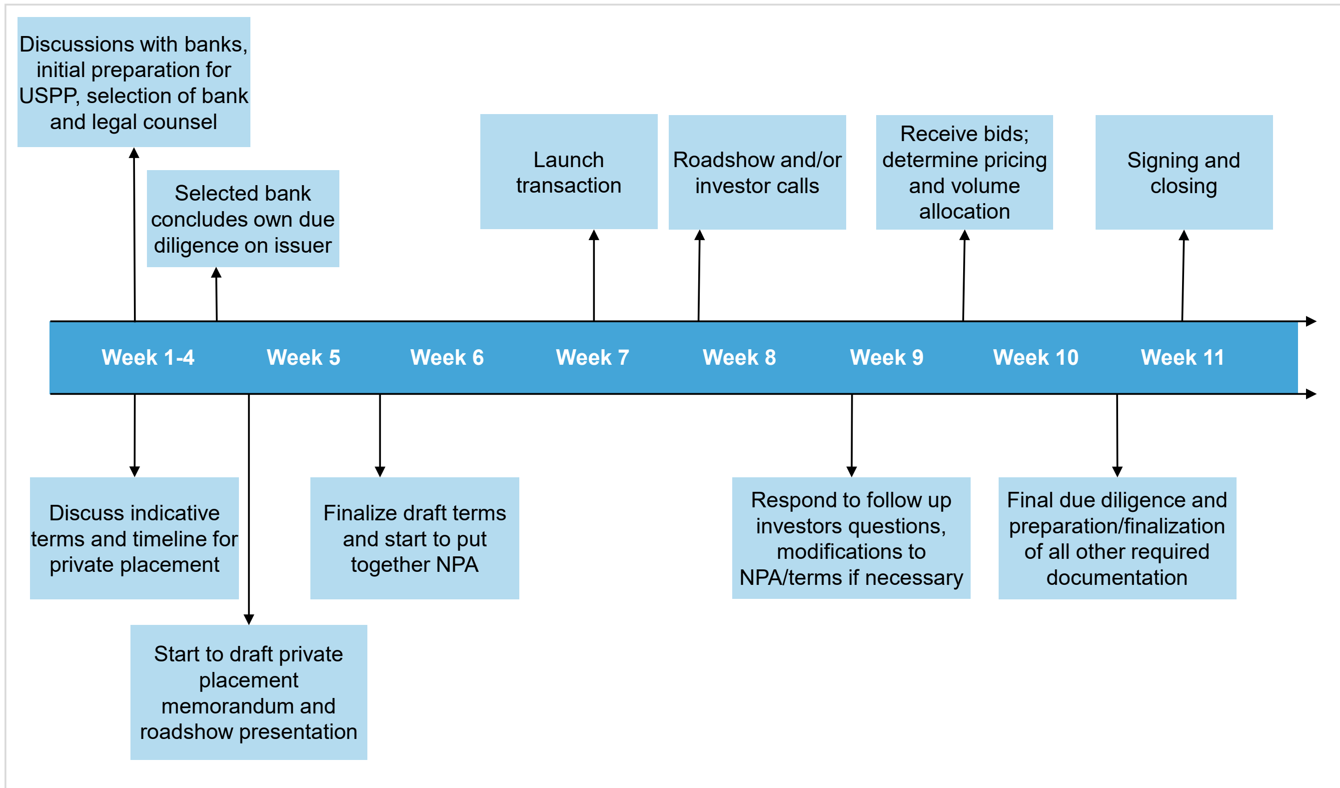
Towards the end of this phase of the transaction, bids are provided by investors and the deal prices are set and, if there is more demand than offered volume, the available volume is allocated among the investors.

15.7.4. Final due diligence, signing and closing

After pricing and allocation, any necessary due diligence points will be finalized and the agreed NPA and other ancillary documents (*i.e.*, legal opinions and investor letters) will be finalized and delivered, with funds provided to the issuer after signing.

15.8 Ongoing information requirements

USPPs documentation will specify ongoing information requirements for information that issuers must provide to USPP holders, most notably in relation to periodic communications verifying the maintenance of financial covenants.


Discussions with banks, initial preparation for USPP, selection of bank and legal counsel
Selected bank concludes own due diligence on issuer
Launch transaction
Roadshow and/or investor calls
Receive bids; determine pricing and volume allocation
Signing and closing
Week 1-4
Week 5
Week 6
Week 7
Week 8
Week 9
Week 10
Week 11
Discuss indicative terms and timeline for private placement
Start to draft private placement memorandum and roadshow presentation
Finalize draft terms and start to put together NPA
Respond to follow up investors questions, modifications to NPA/terms if necessary
Final due diligence and preparation/finalization of all other required documentation

16. LIABILITY IN SECURITIES OFFERINGS

16.1 Introduction 120

16.2 Overview of the Fractured Liability Framework for Securities Issuances 120

16.3. Parties which are Potentially Subject to Liability for Securities Issuances 121

16.4 Due Diligence 121

16.5 Prospectus Liability 122

16.6 Post-Listing Liability 123

16.7 Insurance 124

16.1 Introduction

Liability management is at the core of capital markets practice. Unlike in the negotiation of business contracts, where two or more contractual parties negotiate directly with each other and eventually conclude a contract for the sale of goods or services, a capital markets transaction has the issuer on one side, advised by banks, lawyers and other experts and a large set of investors on the other side. In order for capital markets to function, investors need to have (i) trust in sufficiently strong regulatory frameworks that provide them protection in case of misstatements or omissions in securities offering materials, and (ii) post-listing of such securities, remedies if ongoing information provided to the market is erroneous, misleading or unduly delayed.

16.2 Overview of the Fractured Liability Framework for Securities Issuances

Due to the global nature of capital markets, the liability framework that issuers are subject to when issuing securities is fractured, with legal frameworks in multiple jurisdictions applicable in a given securities offering.

- The liability framework for public offerings with a prospectus in Germany and the EEA is only partially harmonized through EU regulation. Under the EU Listing Act, ESMA has been tasked with providing assessment and recommendations on whether further harmonisation should be considered and has launched a call for evidence to that effect.
- The liability framework for private placements in Europe is not harmonized. Each EEA state has its own civil law/contract law framework under which institutional investors may bring claims against an issuer.
- For SEC-registered offerings in the United States, a comprehensive and fairly strict set of rules apply which is, compared to the European framework, more investor friendly and, consequently, litigation-prone.
- For Rule 144A private placements in the United States, only broader capital markets provisions of U.S. securities law, Section 10b of the Exchange Act and Rule 10b-5 under the Exchange Act are applicable, which are less strict and less far reaching than the SEC-registered liability framework.
- In each country outside of Europe and the United States where securities are sold in private placements, local law, civil law and securities law provisions of that particular jurisdiction apply.

For international transactions in which securities are sold to investors in a multitude of jurisdictions, in theory, lawsuits could be brought based on a variety of different legal frameworks.

In practice, for German or foreign issuers that conducted a public offering of securities in Germany as well as international private placements, lawsuits are rarely brought in Germany and other European countries, while lawsuits and claims by U.S. investors in offerings involving a significant number of sales in the U.S. are more common.

While there have been high profile cases in securities litigations in Europe based on erroneous prospectuses and/or misleading statements or omissions in connection with an offering, generally speaking, such litigation is relatively rare.

Similarly, litigation by U.S. investors as a result of Rule 144A private placements is, compared to securities litigation for SEC-registered transactions, not as common.

16.3. Parties which are Potentially Subject to Liability for Securities Issuances

The working group for a securities transaction can be large and may comprise the issuer, a parent guarantor, other guarantors, its shareholders, management and supervisory board members, banks, lawyers, auditors, IPO advisors, debt advisors, market experts (providing market data), real estate appraisers, fiscal agents/trustees and other advisors. Each jurisdiction in which securities are offered may put a different weight on which parties are subject to liability and under which circumstances. For instance, in the United States board members and auditors can, under certain circumstances, be directly liable to investors, while in Germany, only the issuer, the banks and shareholders can be directly liable. However, in general, the key parties subject to litigation include the issuer, its shareholders and the advising banks:

- **Issuer:** the issuer is the main addressee for litigation under securities law as well as civil law/contract law. However, the nature of securities lawsuits typically involves a significant deterioration in the business and financial situation of an issuer, which leads to damages that an investor can seek compensation for. As a result, an issuer may be close to insolvency or insolvent when litigation claims arise and, thus, investors also typically look towards "deeper pocket" defendants that may share liability.

- **Banks:** the banks involved in a securities offering are a key defendant. In addition to legal claims, investors often have strong and long-term relationships with investment banks, which can put pressure on banks to settle claims, even if there is a substantial chance that in court no, or relatively low, damages would be awarded to investors against the defending banks.

- **Shareholders:** controlling shareholders and existing shareholders selling shares in an IPO are a typical target for investors in securities litigation where such shareholders, similar to the banks, may have "deeper pockets" than the issuer. In particular, in lawsuits relating to IPOs in which shareholders have sold existing shares from their own shareholdings, shareholders are often named as defendants in securities litigations.

- **Management board members:** management board members are the officers of an issuer who are primarily responsible for putting together prospectuses and investor presentations and other offering-related statements. Management is also involved in investor roadshows.

  As a result, *e.g.*, in IPOs, management is typically covered by an extended D&O or special insurance policy to reduce the risk of personal liability.

- **Supervisory board members:** while supervisory board members may technically also be subject to liability, in practice it is much harder to establish claims against them due to their limited involvement in the prospectus and other offering material drafting process.

- **Auditors:** where an investor claim is particularly focused on faulty financial statements or financial information in a prospectus, banks, which are the addressees of comfort letters, may ask for recourse from auditors.

- **Other advisors:** lawyers provide disclosure letters on prospectuses and similar to the situation with auditors, may be subject to recourse claims from banks, issuers or shareholders. Similarly, other advisors may be liable if their provided data which included material misstatements or omissions resulting in investor claims.

16.4 Due Diligence

Throughout this guide, "due diligence" efforts have been mentioned as part of capital markets transactions. Due diligence is the key legal defense against securities law claims by investors and can be used by all potential defendants, with the exception of the issuer in certain U.S. securities law litigation (under which they are subject to strict liability). In particular, banks have a statutory defense under European, German and U.S. law that provides that where they have taken reasonable care and performed an in-depth legal, financial and business due diligence of the issuer and the transaction, they may not be liable for material misstatements or omissions in the prospectus and other offering materials.

U.S. securities law is generally more expansive and investor friendly for capital markets legal actions. In addition, the U.S. has a significantly more litigation-favoring legal system and

environment. As such, the changed liability profile for an offering of securities which also includes private placements in the United States can have a significant impact on the transaction processes and due diligence efforts required by involved banks and thus on the overall costs of a transaction.

Due diligence efforts are not merely a fallback legal defense for banks, they are also important for all potential liability addressees in securities offerings. Extensive due diligence efforts are important for the issuer and its shareholders in order to make sure that the prospectus and other offering materials do not include material misstatements and omissions that could expose them to reputational and other legal damage resulting from securities litigation. Similarly, lawyers and other advisors can suffer serious reputational and relationship damage as a result of insufficient due diligence efforts which result in faulty offering materials.

16.5 Prospectus Liability

16.5.1. Public offerings in Germany

Statutory liability applies under German securities law in cases where securities are admitted to trading or have been publicly offered. Liability arises for false or incomplete information in an approved and published prospectus. If a prospectus contains false or incomplete information, any buyer of such securities may claim the restitution of the purchase price and other costs related to the transaction, if the misstatement or omission was material to the investment decision of the buyer. If the buyer has already sold the security, a claim may also be made for the difference between the contract price and the resale price, if the latter was lower.

For a buyer to have a successful claim, the sale must have occurred after the publication of the prospectus and within 6 months of the admission to trading or public offer of the security. There is a statutory period of limitation of 3 years within which an investor has to bring a claim, dating from the time such investor becomes aware of damages from a material misstatement or omission. There is also an absolute period of limitation of ten years, after which no lawsuits based on a securities prospectus can be brought.

There are a number of statutory defenses, including if the responsible party (the issuer, banks, management board members, shareholders, etc.) can demonstrate that they were not aware of an error or omission in the information contained in the prospectus and this lack of awareness was not a result of gross negligence. In practice, parties other than the issuer or guarantor (*e.g.*, underwriters) who are involved in the preparation of the prospectus are usually indemnified by the issuer or guarantor for any claims that may arise as a result of an omission or misstatement in the prospectus.

16.5.2. Private Placements in Germany and other EEA Countries

In private placements, no approved securities prospectus has to be used for the offer and sale of securities. However, an offering memorandum in scope similar to a prospectus is typically prepared to provide information to institutional investors on which they can base their purchase decision. For public companies, securities are often sold based on the information "in the market," *i.e.*, annual and interim reports, ad-hoc publications and other information published by the issuer.

In all cases, the offer and sale of securities in Germany and EEA countries is regulated by the relevant civil law/contract law principals of the specific jurisdiction. If institutional investors wish to sue an issuer due to misrepresentations or omissions of information in a private placement, such issuer typically needs to have engaged in "fraud"-type or close to "fraud"-type behavior (*i.e.*, intent to mislead the investor or gross negligence) in order for the claimant to succeed.

There is also potential civil law liability for all offer related documents such as press release and roadshow slides (*i.e.* documents other than the prospectus).

16.5.3. Liability under U.S. law for private placements

Unlike the liability regime under German law, liability for private placements of securities in the U.S. to institutional investors such as QIBs is principally governed by securities laws and not contract law. The primary liability provisions under U.S. law for private placements are Section 10(b) and Rule 10b-5 of the Exchange Act.

Similar to German law, the broadest category of liability exposure for securities offerings under U.S. law involves material misstatements or omissions. Section 10(b) of the Exchange Act and Rule 10b-5 apply broadly in connection

with the purchase or sale of any security and prohibit fraudulent devices and schemes as well as material misstatements and omissions of any material facts. Plaintiffs bringing a claim under these provisions must satisfy a burden of proof by demonstrating the following four elements, showing (i) a false statement or omission relating to a material fact; (ii) that such false statement was made with an intent to deceive, manipulate or defraud or, in certain cases, involved recklessness (scienter); (iii) that the plaintiff justifiably relied on such statement or omission; and (iv) that such reliance caused actual damages.

16.5.4. Liability under U.S. law for SEC-registered offerings of securities

Different provisions of U.S. capital markets law apply when an offering is registered with the SEC (*e.g.*, in cases where a German issuer conducts an SEC-registered IPO), in particular, Section 11 of the Securities Act, regarding material misstatements or omissions included in an SEC registration statement and Section 12(a)(2) of the Securities Act, regarding statements made in a prospectus or oral statements in connection with a public offering. Liability under Section 10(b) and Rule 10b-5 of the Exchange Act can also be invoked in SEC-registered transactions.

The most notable difference between liability in SEC-registered offerings and U.S. private placements is that liability claims under Section 11 and Section 12 are generally regarded as "negligence-based" claims, meaning plaintiffs do not have to prove an intent to deceive but must simply demonstrate the inclusion of a material misstatement or omission. A plaintiff is not otherwise required to prove that the defendant knew of the material misstatement or omission or intended to deceive or mislead investors by including untrue information in the registration statement (*i.e.*, the mere existence of a material misstatement or omission is enough to cause liability). This strict liability regime puts investors who sue based on a public offering in the U.S. in a much stronger position than in Rule 144A placements or, respectively, German investors suing based on prospectus liability in a German offering.

16.6 Post-Listing Liability

An issuer that lists its securities in Germany is subject to market abuse and transparency obligations and, potentially, certain other requirements for a company with publicly listed securities, see Chapter 17 "*Post-Listing Obligations*." Fines, criminal sanctions and civil liability exist for violating such post-listing obligations. In particular, material misstatements and omissions in ad-hoc publications, or the delayed publication of an ad-hoc publication, can result in securities claims by investors against issuers. The legal framework for post-listing liability and fines is extensive and depends on the particular circumstances and on the obligation which has been violated by the issuer.

If an issuer has not listed its securities outside of Germany, post-listing obligations typically do not exist in other countries. In particular, private placements under Rule 144A to U.S. institutional investors do not, apart from certain minor requirements for share issuers, result in ongoing, regular securities laws requirements, filings or liability in the United States.

In contrast, for SEC-registered securities, issuers are subject to SEC filing requirements and the SEC can bring regulatory action against violations. Similar to a German listing of securities, investors can bring actions for erroneous and misleading filings and public statements of issuers of SEC-registered securities in the United States. In addition, SEC-registered securities can subject issuers to several additional ongoing compliance requirements, *e.g.*, internal control certifications under Sarbanes-Oxley.

16.7 Insurance

Potential damages for liability claims under securities law can be extensive.

For issuers, IPO insurance (so-called Public Offering of Securities Insurance – "POSI") and directors' and officers' insurance policies are available in Germany, the U.S. and other jurisdictions and may be taken out in order to cover the risks associated with these potential liabilities. A market practice to essentially always use IPO insurance has developed in Germany in recent years, particularly during the 2021 IPO boom.

Professional indemnity insurance for management can broadly cover breach of duty claims that may arise in the preparation and issuance of securities. Apart from D&O insurance and IPO insurance, securities offerings in Germany typically also include special auditors' insurance in equity transactions (IPOs, subscription rights offerings). German auditors limit their liability under the German comfort letter they issue to a certain sum. This limitation is typically too low to be acceptable to banks and is often negotiated for a higher amount. However, auditors typically then require insurance for the increased liability exposure, which is costly for the issuer. As a general market practice, the liability cap for auditors is usually agreed to be between 15% and 25% of the total offering volume, depending on the transaction and the type of issuer. In very large transactions, this cap can fall below 15% of the offering volume.

17. POST-LISTING OBLIGATIONS

17.1 Introduction 126

17.2 Requirements before the issuance of securities 126

17.3 MTF, OTF and regulated markets 128

17.4 Inside Information/*ad hoc* publicity 128

17.5 Delaying disclosure (*Selbstbefreiung*) 128

17.6 Insider lists 128

17.7 Managers' transactions 129

17.8 Transparency rules for regulated markets and share issuances 129

17.9 U.S. Requirements 130

17.1 Introduction

Securities law regulates both offerings of securities to investors and ongoing compliance obligations. Before a listing of securities, capital markets regulations are principally concerned with the manner of offers and sales of securities, the requirement to approve a prospectus and how to engage with retail and institutional investors (pre-listing requirements).

Post-listing obligations are in place principally for the benefit of investors who want to trade in securities on some type of organized market (typically a stock exchange) on which the issuer has listed the securities. These requirements seek to (i) prevent market abuse and (ii) increase transparency:

- Under EU law, certain ongoing market abuse obligations apply if securities are listed on a regulated market, such as the Prime Standard of the Frankfurt Stock Exchange, a multilateral trading facility (MTF), such as the Scale segment of the Frankfurt Stock Exchange, or an organized trading facility (OTF), which are certain alternative markets for securities.

  The EU Market Abuse Regulation (MAR) came into force July 2016 and subjects all securities traded on these market types (regardless of the type of securities) to requirements designed to prevent market abuse. Implementing regulations for various MAR topics apply to certain activities and requirements with regard to market sounding, insider information and insider lists and stabilization and buy-back activities. The MAR replaced previously disharmonized national market practices and interpretations of market abuse regulations within the EEA. Despite the harmonization of the applicable regulations, no single competent authority oversees the compliance by issuers with the MAR, which is resulting, to a certain degree, in a continuous divergence of market practice and interpretations applicable in the EEA.

- Transparency regulations commence with the application for a listing on a regulated market; most notably, these requirements include the regular publication of reports, such as annual reports and interim reports. Securities listed on an unregulated (exchange-regulated) market, such as an MTF, are only subject to the ongoing publication requirements issued by the relevant exchange, which are typically less stringent. However, under the MAR, even issuers with securities listed on unregulated markets must release "*ad hoc*" publications of material events which constitute insider information.

17.2 Requirements before the issuance of securities

In addition to an approved prospectus, various other capital markets requirements apply to a securities offering process.

17.2.1. Advertisements

EU, German and U.S. laws set a framework for advertisements and public announcements of securities offerings.

An advertisement, press release or interview with issuer's management that provides details of a proposed securities offering may be viewed as an offer to sell securities to the public.

Offering participants therefore must take care to limit communications to the public about an upcoming securities issue. Publicity guidelines outlining restrictions on communications in the run-up to an offering are prepared by counsel advising on the transaction and implemented by the offering participants. In particular, certain disclosures are required for statements relating to securities transactions.

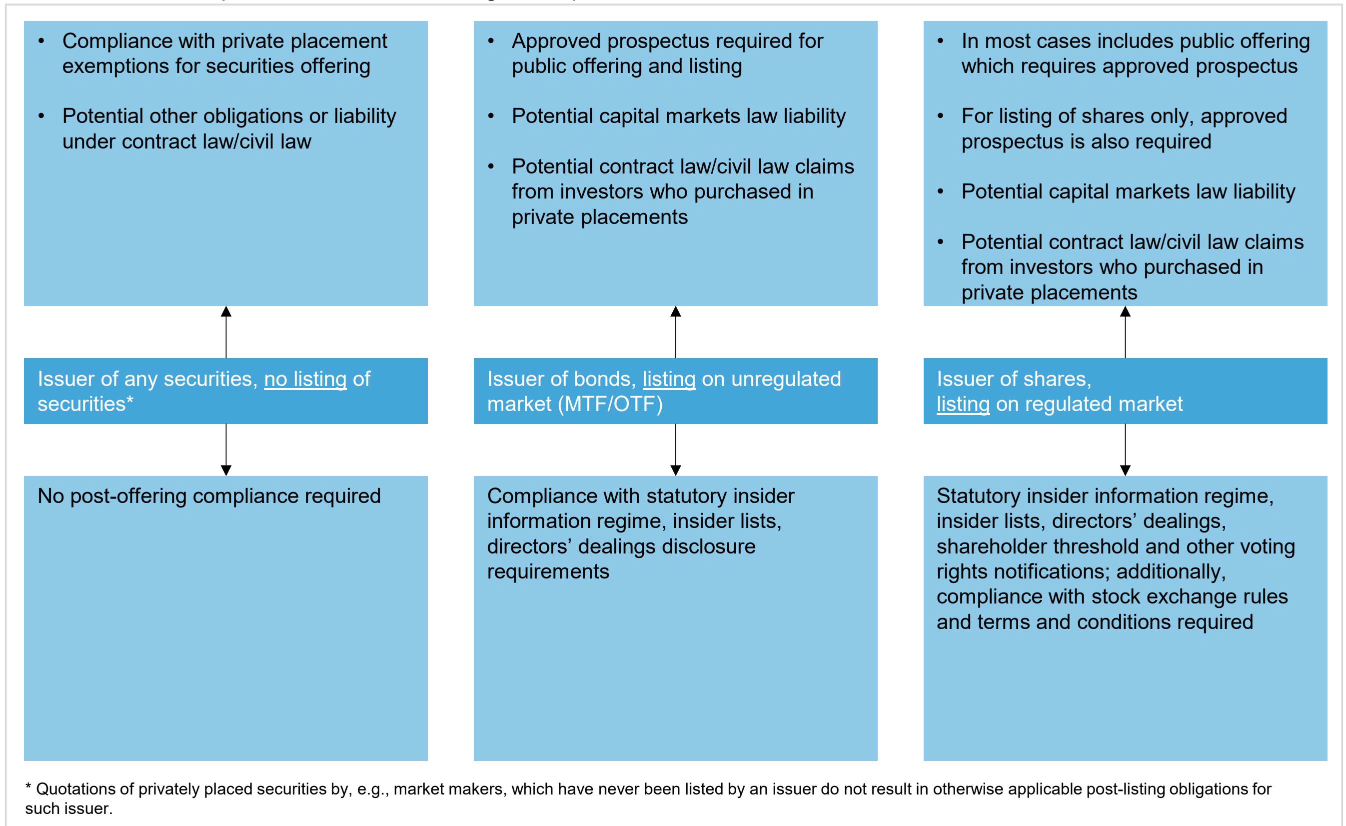
17.2.2. Market Sounding

Market sounding (also called pre-marketing, pilot fishing, pre-sounding or early-look meetings) is a standard practice in many securities offerings. It involves meetings with investors before an offering in order to gauge investor interest for the securities. Following the effectiveness of MAR in July 2016, market sounding in the EEA has become more strictly regulated.

During market sounding, a select group of investors is typically provided with non-public information about the issuer and the offering. In offerings by issuers whose securities are listed on a stock exchange, investors who are approached for market sounding usually sign a non-disclosure agreement, if there is a possibility that the information presented to them could be viewed as inside information. However, even for issuers who do not have listed securities, market sounding can be problematic. Non-public information about these issuers provided to investors during market sounding could

become inside information once an application for listing is filed.

Under MAR regulations and existing market practice, issuers should take certain precautions to ensure legal compliance with respect to market sounding. There must be detailed record keeping of investor meetings and the issuer and its advisors should determine before such meetings whether inside information will be disclosed.



17.2.3. Application for listing

The MAR applies to issuers and other responsible parties once an application to list securities on a regulated market or MTF is made. Even before an official listing, "grey market trading" on unofficial markets can occur, in particular before an IPO's first official trading day. It is thus important to consider "post-listing" obligations earlier than on the first official trading date.

17.3 MTF, OTF and regulated markets

Before the MAR, issuers of securities were subject to regulatory post-listing obligations only if their securities were listed on a regulated market. Issuers of other securities, such as bonds, not listed on a regulated market were typically exempt from post-listing obligations. An issuer of bonds listed on an unregulated (or exchange regulated) market would need to comply only with specific stock exchange requirements.

However, since MAR came into force in July 2016, market abuse rules apply to all listed securities, regardless of the type of securities or the stock exchange segment on which they are listed.

Securities such as bonds can be quoted on an unregulated market (*e.g.*, Frankfurt Stock Exchange *Freiverkehr/Open Market*) even if the securities were sold solely in a private placement and are not listed. Issuers of securities that are only quoted by a market maker and for which no application for a listing has been made by the issuer are not subject to post-listing obligations under MAR, but may have other obligations or liability exposure under contract or civil law.

17.4 Inside Information/*ad hoc* publicity

An issuer must immediately publish any inside information, unless an exemption applies to permit the issuer to publish the information at a later time (*Selbstbefreiung*).

Inside information is any information of a precise nature, which has not been made public, relating, directly or indirectly, to an issuer or to a financial instrument, and which, if it were made public, would be likely to have a significant effect on the price of the financial instrument or on the price of related derivative financial instruments.

Most of the time, non-public information is not considered to qualify as "inside information" because it is unlikely to have a significant effect on the price of the relevant security or related instruments. There are no specific thresholds to determine what constitutes a significant effect. In Germany, market practice generally consider a 3-5% price change for shares (regardless of whether the price moves up or down) and a 1-2% price change for bonds to be significant.

Inside information must be published immediately via a broad media and filed with the applicable regulator (*e.g.*, BaFin in Germany and relevant stock exchanges) upfront.

Non-compliance can result in fines, investor lawsuits and may even constitute a criminal act. Publication is typically made through a service provider IT system (such as DGAP or GlobeNewswire) as a so-called "*ad hoc* announcement" and disseminated widely to media outlets in Europe.

Due to the importance of inside information rules, companies implement internal compliance guidelines outlining responsibilities for the process and setting out guidelines for exemptions and determination of what constitutes inside information.

17.5 Delaying disclosure (*Selbstbefreiung*)

An issuer may delay public disclosure of inside information if (i) immediate disclosure is likely to prejudice the legitimate interests of the issuer, (ii) disclosure delay is not likely to mislead the public and (iii) the issuer is able to ensure the confidentiality of the information.

17.6 Insider lists

All issuers subject to the MAR with securities listed on a regulated exchange or an MTF need to draw up insider lists. The MAR has expanded the requirement to draw up insider lists to issuers which, *e.g.*, have only bonds outstanding on an unregulated market. Insider lists need to include information on all persons who have access to particular insider information, both internally within a company and individuals at external advisors or other external parties.

Technically, most issuers draw up a permanent section of insider lists which include all persons who, on a regular basis, have access to sensitive information. In cases in which inside information exists which would need to be published, issuers

can then more easily create a specific insider list by appending the permanent section and adding any relevant other persons to the specific insider list.

17.7 Managers' transactions

Under the MAR, persons discharging managerial responsibilities within an issuer, as well as persons closely associated with them (such as persons with familial or other close relationships to the managers) must notify the issuer and the competent regulator of transactions in listed securities of that issuer. There is also a statutory black-out period of 30 days before the publication of an annual or interim report. During the black-out period, it is generally unlawful for managers and their closely associated individuals to purchase or sell listed securities of the issuer.

There is a *de minimis* exemption in Germany for transactions totaling €20,000 or less, calculated on a yearly basis.

Issuers should establish internal guidelines to ensure compliance with requirements relating to managers' transactions.

17.8 Transparency rules for regulated markets and share issuances

While the MAR extends market manipulation rules for listed securities to unregulated markets and virtually all classes of securities, transparency rules are applicable only to issuers of shares and securities listed on a regulated market.

17.8.1. Annual and interim reports

The German Securities Trading Act (implementing the EU Transparency Directive) requires issuers of securities listed on a regulated market to publish (i) an annual report within four months after the end of the fiscal year and (ii) a half-year report within three months after the end of the first half of the fiscal year.

While the German Securities Trading Act no longer requires publication of quarterly reports, the Frankfurt Stock Exchange continues to require for issuers of shares listed in the Prime Standard segment publication of quarterly statements for issuers of shares, although with more limited information than in traditional quarterly reports which had to be published before the legal changes took effect at the end of 2015.

While the German Securities Trading Act does not apply to securities listed on an unregulated market, essentially all stock exchanges in the EEA require the publication of annual and half-year reports in order to maintain a share listing on an unregulated market.

For bonds listed on an unregulated market, the terms and conditions of the bonds typically govern ongoing disclosure requirements and provision of information to bondholders.

17.8.2. Voting rights notifications

Under the German Securities Trading Act, shareholders who reach certain voting rights thresholds (3%, 5%, 10%, etc.) must notify the issuer and the competent regulator. The issuer is required to publish shareholder notifications on its website.

The shareholder notification requirements are complex and can require significant analysis in situations involving shareholder agreements, options or other voting arrangements.

Additionally, changes in the total number of voting rights attributable to a shareholder, *e.g.*, as a result of a capital increase, must be published and filed with the competent regulator. Similarly, an issuer who reaches certain thresholds through acquisition of its own shares must also publish the information and file a notification with the regulator.

17.8.3. Financial calendar

An issuer of shares listed on the Prime Standard of the Frankfurt Stock Exchange must publish (and update) a financial calendar prior to the beginning of each fiscal year, detailing all material publication events, as well as dates of the annual shareholders' meeting, analyst and press conferences.

17.8.4. Other requirements

The German Securities Trading Act includes a significant number of additional transparency requirements for listed securities, including a requirement for German issuers to provide the same information to all investors under the same circumstances and to publish requirements for annual shareholders' meetings and bondholders' meetings.

17.9 U.S. Requirements

SEC-registered issuers are subject to extensive ongoing disclosure rules, principally under the Exchange Act. These are principally geared towards similar transparency requirements as in the EU, but due to their complexity these are not addressed in detail in this guide. For further information contact us.

Issuers of securities to U.S. investors in private placements (*e.g.*, under Rule 144A) generally comply with information requirements under Rule 12g3-2(b) under the Exchange Act. This requires the issuer to publish (in English) on its website all disclosure made available in the issuer's home jurisdiction.

The following table sets forth general post-listing requirements for German issuers of bonds and shares:

Post-listing requirements on an unregulated market	Post-listing requirements on a regulated market
• Prohibition of insider trading and market manipulation • Publication of inside information • Observance of rules regarding delay of publication of inside information (Selbstbefreiung) • Insider lists • Observance of regulations relating to managers' transactions • Publication of annual and interim reports and other disclosure based on the terms and conditions of the bonds and/or stock exchange rules (but not statutory legislation) • Other requirements, such as publication of events affecting bondholder rights based on stock market rules and/or national or EU transparency rules	• Prohibition of insider trading and market manipulation • Publication of inside information • Observance of rules regarding delay of publication of inside information (Selbstbefreiung) • Insider lists • Observance of regulations relating to managers' transactions • Publication of annual and half-year reports; publication of quarterly statements depending on stock exchange rules • Shareholder voting rights notifications and issuer voting rights notifications (only in case of listed shares; not applicable to bonds) • Publication of financial calendar and, when listed on the Frankfurt Stock Exchange Prime Standard, holding at least one analyst conference annually • Other requirements, such as announcement of events affecting shareholders and shareholder meetings

18. ESG

18.1 Emergence of ESG Initiatives 132

18.2 Regulation and Disclosure 132

18.3 EU Corporate Sustainability Reporting Directive 132

18.4 Sustainability Disclosure in Prospectuses 133

18.5 UK Climate-related Disclosure Requirements 133

18.6 SEC Proposed Rules and Current Guidance 134

18.7 ESG Focused Products 134

18.8 Conclusion 135

18.1 Emergence of ESG Initiatives

Over the past several years, increasing interest from investors, regulators and others regarding environmental, social, and governance ("**ESG**") topics has led companies to update their policies, make certain commitments and employ other measures in accordance with a variety of ESG objectives. Organizations have been encouraged to develop sustainable and ethical supply chains, reduce their greenhouse gas emissions and carbon footprint, reduce waste, increase board diversity and responsiveness to shareholders, and disclose their progress on these and several other sustainable goals. As a result, prominent global institutions, non-profit organizations and others have joined forces to create ambitious targets and frameworks that companies have begun to adopt, such as those of the UN Sustainable Development Goals, the Task Force on Climate-Related Financial Disclosures and the Science Based Targets Initiative.

18.2 Regulation and Disclosure

While companies have pursued some action at the request of investors or their own initiative, regulators are also taking an increased interest in the topic and there are a number of recently announced or pending regulatory updates that will require publicly listed and other regulated companies to provide enhanced ESG disclosures. Regulators have recognized that a lack of a standardized framework for disclosing climate-related risks, for example, makes it challenging for companies to provide consistent and useful information that investors can evaluate.

In February 2019, the German Federal Government declared its ambitions to make Germany a leading location for sustainable finance and subsequently adopted the Climate Action Program 2030. As a result, in December 2019, BaFin published a guidance notice on addressing sustainability risks, directed in particular to supervised entities such as credit institutions, investment firms, insurance undertakings, fund management companies and pension funds. The guidance notice encouraged entities to review their business strategies, identify and evaluate potential ESG risks, review their risk strategies to ensure that ESG risks are taken into account, and explicitly communicate the measures being implemented to managers, employees, clients, and investors in order to enhance transparency and trust. In July 2023, BaFin published its sustainable finance strategy, which describes BaFin's role as a supervisory authority and its areas of focus.

18.3 EU Corporate Sustainability Reporting Directive

The Corporate Sustainability Reporting Directive ("**CSRD**") entered into force in the EU on January 5, 2023. The CSRD imposes reporting requirements on EU companies classified as large undertakings, parents of large EU undertakings, public interest undertakings, or large non-EU groups. While the CSRD is the law that requires companies to disclose sustainability information, the specific information to be reported is outlined in the form of European Sustainability Reporting Standards ("**ESRS**"). At the end of July 2023, the EU Commission adopted twelve ESRS for use by all companies subject to the CSRD. The reporting requirements will be phased in over time for different companies.

The ESRS include two cross-cutting standards which set out general principles of sustainability reporting as well as disclosure requirements. The general disclosures include how entities comply with the ESRS, the way sustainability is embedded in an entity's business strategy and business model, and how an entity identifies and manages its principal sustainability impacts, risks, and opportunities. The ESRS also include ten topical standards that provide disclosure requirements for sustainability impacts, risks, and opportunities that are deemed material for all undertakings regardless of the sector in which an entity operates. These include, for example, climate, workers in the value chain, affected communities, biodiversity and ecosystems, and business conduct.

One of the key features of the CSRD is the application of a double materiality standard which encompasses both financial materiality and impact materiality. This concept is intended to extend the bounds of materiality beyond issues that will affect a company's financial performance. Entities will need to consider the matters in which they are having a material impact on society regardless of whether the matters also affect the company's bottom line. Disclosure requirements for companies already required to report under the Non-Financial Reporting Directive began on January 1,

2024. Other entities will need to begin reporting between 2025 and 2028 depending on the category of the company.

18.4 Sustainability Disclosure in Prospectuses

In July 2023, the European Securities and Markets Authority ("**ESMA**") issued a Public Statement on sustainability disclosure in prospectuses. Article 6(1) of the Prospectus Regulation states that prospectuses shall contain the necessary information which is material for an investor to make an informed assessment of, among other things, the issuer's profits and losses, the rights attaching to the securities, and the reasons for the issuance. Because ESG issues can constitute material risks for the issuer as mentioned in Recital 54 PR, ESMA expects that material sustainability-related disclosure will be included in equity and non-equity prospectuses as well as final terms.

ESMA recommends that issuers consider sustainability-related matters when preparing prospectuses to the extent that the effects of those matters are material. The type of information required to satisfy Article 6(1) PR will depend on the materiality of the information to an investor. The concept of materiality is a dynamic one, as it can vary based on the presentation of new issues and circumstances. As a result, it is imperative that issuers evaluate their circumstances and the type of securities being offered as part of this analysis. ESMA has also commented on the fact that in the past, some issuers include sustainability-related disclosure in marketing materials and other communications which are not included in their prospectuses Issuers can expect that ESMA and others will closely scrutinize such situations and all sustainability-related disclosure in connection with future issuances.

The EU Listing Act further provides that delegated acts will specify which information issuers required to provide sustainability reporting in accordance with the Corporate Sustainability Reporting Directive (CSRD) will need to disclose.

18.5 UK Climate-related Disclosure Requirements

The UK's Streamlined Energy and Carbon Reporting ("**SECR**") policy, introduced in 2019, requires certain companies to report their energy use, carbon footprint, and greenhouse gas emissions in their annual financial reporting. SECR requires companies that have consumed more than 40,000 kilowatt-hours (kWh) of energy in the reporting period to disclose energy and carbon information. Companies who meet this energy threshold and are listed on the London Stock Exchange, a European Economic Area market, NYSE or NASDAQ, large unquoted companies, large limited liability partnerships, and academy trusts are subject to SECR. Companies are required to disclose on a "comply or explain" basis, allowing entities to omit data in instances where it is not possible to collect it as long as the company identifies what has been excluded and why.

In January 2022, the UK also issued mandatory climate-related financial disclosure requirements to apply to reporting for financial years starting on or after April 6, 2022. The regulations require certain UK companies to disclose climate-related financial information in their annual reporting in line with recommendations from the Task Force on Climate-Related Financial Disclosures ("**TCFD**"). Entities subject to these regulations include all UK-registered companies that are currently required to produce a non-financial information statement, UK-registered companies with securities admitted to the Alternative Investment Market, and UK-registered companies and limited liability partnerships that have more than 500 employees and turnover of more than £500 million.

The regulations require mandatory disclosure of material information in all of the TCFD core sections: governance, strategy, risk management, and metrics and targets. UK entities subject to the disclosure requirements must provide information about, for example, the board's oversight of climate-related risks and opportunities and the impact of climate-related risks and opportunities on the entity's business, strategy, and financial planning.

Companies in other jurisdictions have also adopted the TCFD in some instances for purposes of guiding their voluntary sustainability reporting, especially where there is otherwise a lack of standardized reporting framework.

In May 2024, the UK published a new framework for the development of UK sustainability reporting standards (SRS) and an implementation update on economy-wide sustainability disclosure requirements (SDR), under which companies, including listed issuers and asset managers and

asset owners, will be required to report on their sustainability risks, opportunities and impacts.

18.6 SEC Proposed Rules and Current Guidance

In March 2024, the SEC adopted long-awaited disclosure requirements to enhance and standardize the climate-related disclosures that require registrants, including foreign private issuers, to provide climate-related disclosures in their registration statements and periodic reports (the "**Climate Disclosure Rules**"). The disclosures must contain information about climate-related risks that are reasonably likely to have a material impact on their business, results of operations, financial condition, and certain climate-related financial statement metrics in a note to their audited financial statements. Issuer that are classified as "large accelerated filers" will generally need to start complying with the Climate Disclosure Rules for disclosures related to fiscal years that begin in 2025, while "large accelerated filers" will need to comply in fiscal years that begin in 2026 and other registrants will need to comply in fiscal years that begin in 2027.

In reporting their climate-related risks, registrants will need to disclose their greenhouse gas ("**GHG**") emissions for the purpose of risk exposure assessment. Registrants will be required to report direct GHG emissions (Scope 1) and indirect emissions from purchased electricity or other forms of energy (Scope 2). Accelerated and large accelerated filers must obtain an attestation report from an independent attestation service provider that covers, at a minimum, Scope 1 and 2 emissions disclosure. In a significant departure from the originally proposed rule, the SEC has not mandated disclosures of GHG emissions from upstream and downstream activities in its value chain (Scope 3).

The SEC declined to adopt any exceptions or accommodations for foreign private issuers. However, the Climate Disclosure Rules will not apply to private companies that are parties to business combination transactions involving a securities offering registered using Form S-4 or F-4. In addition, these new disclosure requirements will not apply to any non-US companies whose equity securities are deposited into Level 1 ADR programs to facilitate over-the-counter trading in the United States. These companies typically rely on an exception from US registration requirements and are not subject to periodic reporting requirements under relevant SEC rules.

The Climate Disclosure Rules may, however, influence the disclosures included in offering documents used in private placements to US institutional investors pursuant to Rule 144A, which are exempt from US registration requirements but subject to Rule 10b-5 liability for material misstatements and omissions. Participants in these private placements generally have used disclosure requirements that apply to public offerings registered with the SEC as a guide when considering whether they are disclosing all material information to investors in their offering documents.

18.7 ESG Focused Products

The market has also seen a significant increase in recent years in the issuance of green and sustainable debt and equity products as well as the growing emergence of a demand by investors for independent organizations to provide issuers and products with ESG risk ratings.

Equity products often contain descriptions of a company's specific ESG ambitions and rating as a further incentive for investors to invest in the product. Debt products can be tied even further to specific ESG projects or ambitions of a company and are often categorized as either "Use of Proceeds" products or "Incentive-Based" products. The former includes green bonds, whose proceeds are designated for specific climate-related or "green" projects, as well as social bonds, whose proceeds are designated for socioeconomic services and infrastructure projects, and sustainability bonds with a use of proceeds designation that is usually intended to further projects which contain both green and social objectives. The latter category of debt products includes sustainability-linked bonds, which are structured in accordance with ESG key performance indicators and link their pricing mechanism to achievement of the performance targets outlined within the offering documents.

ESMA also recommends that the prospectuses of non-equity securities advertised as taking into account a specific ESG component or pursuing ESG objectives, like green and sustainable bonds, should include the sustainability disclosure pursuant to Article 6(1) PR. The information to be

disclosed depends on the characteristics of the relevant securities being offered by the issuer.

In line with the EU Listing Act, delegated acts will be enacted that will take into consideration several factors regarding ESG disclosure. For non-equity prospectus, whether the relevant securities are advertised as taking into account ESG factors or pursuing ESG objectives. The prospectus for a European Green Bond shall incorporate by reference the relevant information contained in the European Green Bond factsheet as referred to in Article 10 of the Green Bond Regulation. The prospectus for a bond marketed as environmentally sustainable or for a sustainability-linked bond (as referred to in the Green Bond Regulation) shall include the relevant optional disclosures, provided that the issuer has opted in for these optional disclosures.

While no standardized ESG rating methodology exists, third-party service providers such as Sustainalytics have begun to provide ESG scores on public companies. These scores, along with reports from issuers, can provide investors with a useful point of reference for identifying and analyzing sustainable investments.

In response to the International Organization of Securities Commissions (IOSCO) recommendations on ESG ratings providers, the UK launched its finalised Code of Conduct for ESG Ratings and Data Providers in December 2023 ("**UK Code**"). The UK Code, intended to be available for use by providers in any jurisdiction, sets out best practice principles for ESG ratings providers. In contrast with the voluntary UK Code, the EU will introduce a mandatory regime on the transparency and integrity of ESG rating activities. In February 2024, political agreement was reached on the European Commission's proposal for a regulatory framework for ESG ratings activities. he EU Ratings Regulation is expected to be formally adopted in late Q3 or Q4 2024 and is set to apply 18 months after its entry into force.

18.8 Conclusion

As ESG initiatives, oversight, and practices continue to develop, debt and equity transactions may need to further change to meet investor needs and regulatory requirements. Further attention to ESG developments may also be required by companies in order to mitigate litigation risks related to material misstatements or omissions in offering documents, maintain ongoing reporting commitments and to ensure compliance with increasing and changing regulatory requirements.

19. PORSCHE IPO CASE STUDY

19.1	Introduction	137
19.2	European Legal Regime for Retail Offerings	137
19.3	Economic Considerations for Retail Offerings in an IPO	138
19.4	Retail Offerings by European Companies in the United States	139
19.5	Conclusion	139

19.1 Introduction

In September 2022, the IPO of Dr. Ing. h.c. F. Porsche AG ("**Porsche**") launched and ultimately priced at the top of the price range, making it the largest European IPO on record by market capitalization (around EUR 78 billion according to Porsche). The deal was also one of the largest European IPOs by offer size, with approximately EUR 9.4 billion in preferred shares sold to the public.

Sixteen banks were involved in placing shares, including BofA Securities, Citi, Goldman Sachs and J.P. Morgan as Joint Global Coordinators in addition to three Senior Joint Bookrunners, four Bookrunners, three Co-Lead Managers and a Swiss Selling Agent.

Listing on the Frankfurt Stock Exchange, the Porsche IPO also involved an unprecedented, simultaneous retail offering in six European countries (Germany, France, Italy, Spain, Austria and Switzerland). Although most of the shares offered in an IPO are typically purchased by institutional investors in private sales, the Porsche IPO demonstrated a strong demand from European retail investors and showcased the benefits that a pan-European retail offering can provide for the right company.

While retail offerings in the US market commonly address a population of 330 million in US registered IPOs with listings on NASDAQ or the NYSE, retail offerings in Europe are often limited to the population of the home country of the issuer. There have been some successful IPOs involving more than one EU member state, however, large pan-European retail offerings in several European countries are not common. When taken together, the European jurisdictions could rival the US in terms of potential retail investor reach.

19.2 European Legal Regime for Retail Offerings

In accordance with the EU Prospectus Regulation, any offer of securities to the public in an EU state requires an approved and valid securities prospectus. Article 2(d) of the EU Prospectus Regulation specifies that an offer of securities to the public means a communication to the public in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe for these securities. In other words, any retail campaign that either offers or markets shares in an IPO to the public in an EEA state, can only be conducted on the basis of an approved securities prospectus.

While there are several exceptions to the requirement to publish and use a securities prospectus to offer shares (such as for example a smaller sized offering), in a typical IPO of a sizeable company a securities prospectus is required both for the public offering and for the subsequent listing of the shares on the regulated markets of an exchange in the EEA.

According to the EU Prospectus Regulation, it is the capital markets authority in the home member state of the IPO issuer which is responsible for approving the securities prospectus. For Porsche, the BaFin had the authority to review and approve the prospectus.

Under the EU Prospectus Regulation, an issuer can request that the prospectus approval is "passported", i.e., notified, to other European countries which are part of the EEA. In theory, this means that a securities prospectus can also be used for an offer to the public or to admit shares in every other EEA signatory state without requiring a new securities prospectus to be submitted and approved by the local supervisory authority of the other EEA states (although in practice in some jurisdictions drafts of the prospectus are reviewed by the host competent authority in connection with an application for admission to trading in that host EU member state).

While the passporting regime has in principle been set up so that issuers can easily use an approved securities prospectus in another EEA state, in practice there are some key considerations that limit the use of the passporting system for IPOs, namely:

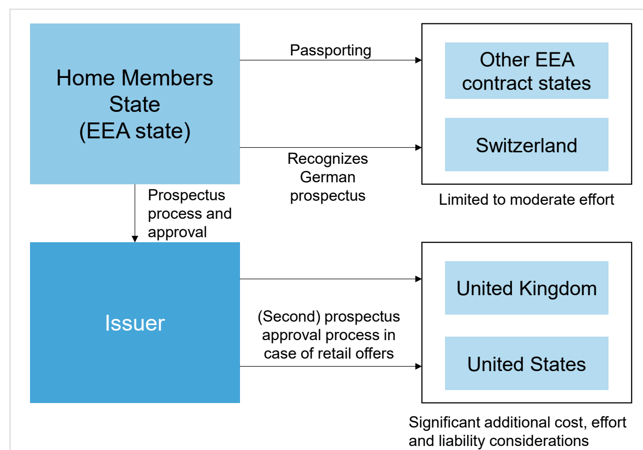
- the requirement to include a local language summary of the prospectus in the approved securities prospectus in many EEA jurisdictions and to announce certain offering relevant information in the local language;
- the market practice to include tax summaries for the relevant retail offerings in the securities prospectus from a liability management and disclosure perspective;
- specific local law actions in member states with a retail offering that go beyond the requirements in the EU

Prospectus Regulation and which require coordination with legal advisors outside of the IPO issuer's home jurisdiction, thus increasing costs and coordination efforts;

- the requirement to have a bank coordinate the various retail offerings and take retail orders in each of the member states in which a retail offering is made;
- a divergence in practice for some specific requirements (e.g., while Germany only requires 6 business days for a retail offer period, other EEA member states have slightly longer offer periods); and
- variations in the applicable litigation and legal regimes in different EEA countries applying to public offerings of shares to retail investors.

Following the withdrawal of the United Kingdom from the European Union, the UK is now outside of the EU/EEA prospectus passporting regime. As a result, a retail offering in the UK by an EU incorporated issuer would require a separate prospectus to be prepared, reviewed and approved by the UK Financial Conduct Authority. Unlike in many EU jurisdictions, in the UK both the issuer and its directors have to take express responsibility for the content of the prospectus through the responsibility statement. In the Porsche IPO, no UK retail offering was conducted.

RETAIL OFFERS | OFFERS TO THE PUBLIC



A further important consideration when forming the banking syndicate for future pan-European IPOs is the designation of a bank to act as a central "retail coordinator" and selecting one or more representative banks to be responsible for conducting the retail offering in each designated jurisdictions with an offering to the public. In some cases, a single bank can also be named as the responsible underwriter for that country and given authority through a power of attorney to sign the underwriting agreement and act on behalf of multiple banks marketing to retail investors in that jurisdiction.

19.3 Economic Considerations for Retail Offerings in an IPO

Initial public offerings of companies which have a strong brand awareness and/or have a cross-European footprint with a loyal customer group are strong candidates for IPOs with a pan-European retail offering.

Overall, strong brand names have the potential to attract significant retail demand as a percentage of the offer size (between 5% and 10% of the eventually allocated orders). In the Porsche IPO, the retail component of all shares placed was 7.7% of the total placement volume of 113,875,000 shares, amounting to over EUR 700 million in volume allocated to retail investors. According to Porsche's press release on September 29, 2022, there was significant demand above the allocated amount. While all orders up to 30 shares were fully allocated orders, orders above such amount were only allocated 23% of their orders, meaning the overall retail demand in the book was substantially higher than the allocated EUR 700 million.

Other significant economic benefits of retail offerings in an IPO include positive public attention and significant interest by the public post-listing. A company may also wish to build further loyalty and promote the ability of employees and customers to purchase shares in the IPO and potentially receive preferential allocations, which would be detailed in the securities prospectus.

19.4 Retail Offerings by European Companies in the United States

Public offerings of shares in the United States can attract significant demand from the US public. As an example, when Ferrari conducted its IPO in 2015, it opted to publicly offer its shares in the United States, rather than in Italy. The approximately USD 900 million IPO of Ferrari was reportedly multiple times oversubscribed and benefited from significant demand from retail investors in the US in excess of USD 1 billion (thus covering more than the offered number of shares). This also allowed it to create a significant marketing campaign and have customers in one of the company's biggest markets participate in the IPO. As a result of the retail offering in the US, Ferrari listed its shares on the New York Stock Exchange in addition to a listing on the Euronext Milan.

A public offering of shares in the United States and a listing in the United States requires a Securities and Exchange Commission approved prospectus. In addition, a listing on, e.g., the NYSE or NASDAQ in the United States subjects a European company to US securities law liability and requirements, including regular reporting, risk management and US disclosure rules. As a result, while a US public offering can attract significant retail demand for a European company, the offering and listing in the US involves considerable initial legal and organizational efforts and ongoing US securities law compliance and reporting following the IPO. See Chapter 4 "*SEC-Registered Initial Public Offerings*" for further information.

19.5 Conclusion

Most of the demand seen in IPOs in Europe comes from institutional investors. Many German issuers in the past have exclusively relied on private placements to institutional investors to sell shares in an IPO. Securities prospectuses are then approved as pure listing prospectuses. However, for companies that want to leverage related marketing aspects and retail demand benefits, public offerings are increasingly relevant for strengthened demand in the order book, heightened brand recognition and the promotion of post-listing trading liquidity. Strong and well-known brand names such as Porsche not only attract significant press coverage for an IPO, but they also provide a unique opportunity for customers and employees as well as other members of the public to participate as investors in the public company. The Porsche IPO is a unique example of a retail IPO simultaneously conducted in six European countries and targeting a population of 280 million, rivalling the public offerings of companies conducted in the US. However, it also showcases a path for other companies with strong brand recognition and customer loyalty to conduct similar pan-European retail offerings in order to harness significant marketing upside and expand the overall IPO audience.

For further information on any topic discussed in this guide, please contact our capital markets team in Germany

GLOSSARY

10b-5 or Rule 10b-5 – Rule 10b-5 under the Exchange Act

144A or Rule 144A – Rule 144A under the Securities Act

ABB – accelerated book build private placements

ADR – American depositary receipt

ADS – American depositary shares

AG – German stock company (*Aktiengesellschaft*)

AGM – annual general meeting (*ordentliche Hauptversammlung*)

BaFin – German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*)

CSSF – Luxembourg regulatory authority (Commission de Surveillance du Secteur Financier)

D&O – directors and officers

EBIT – earnings before interest and taxes

EBITDA – earnings before interest, taxes, depreciation and amortization

EEA – European Economic Area

EGC – emerging growth company

EMTN – European medium term note program

ESMA – European Securities and Markets Authority

EU – European Union

EU Prospectus Regulation – Commission Regulation 2017/1129 of 14 June 2017

EUR or € – euro

Exchange Act – U.S. Securities Exchange Act of 1934, as amended

FINRA – U.S. Financial Industry Regulatory Authority

FPI – foreign private issuer

GAAP – generally accepted accounting principles

GBP or £ – British pound sterling

GmbH – German limited liability company (*Gesellschaft mit beschränkter Haftung*)

IASB – International Accounting Standards Board

IFRS – international financial reporting standards

IPO – initial public offering

ITF – intention to float

KGaA – German limited partnership with shares (*Kommanditgesellschaft auf Aktien*)

LBO – leveraged buyout

M&A – mergers and acquisitions

MAR – EU market abuse regulation (596/2014/EU)

MD&A – management's discussion and analysis

Mittelstandsanleihe – German private mid-cap company bonds

MTF – multilateral trading facility

NAIC – U.S. National Association of Insurance Commissioners

NPA – note purchase agreement

NYSE – New York Stock Exchange

OTF – organized trading facility

PPM – private placement memorandum

QIB – qualified institutional buyer, defined in accordance with U.S. securities law

Regulation S or Reg S – Regulation S under the Securities Act

SA – Luxembourg public limited company (*Société anonyme*)

Schuldscheindarlehen – German promissory notes

SE – European public limited liability company (*Societas Europaea*)

SEC – United States Securities and Exchange Commission
Securities Act – U.S. Securities Act of 1933, as amended
Securities Trading Act – German Securities Trading Act (*WpHG*)

Stock Corporation Act – German Stock Corporation Act (*AktG*)

T&Cs – terms and conditions

USD or U.S.$ or $ – U.S. dollar

USPP – U.S. private placement

C L I F F O R D

C H A N C E

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. If you would like to know more about the subjects covered in this publication or our services, please contact the authors or your usual contact at Clifford Chance.

www.cliffordchance.com

Clifford Chance, Junghofstraße 14, 60311 Frankfurt am Main, Germany

© Clifford Chance 2025

Clifford Chance Partnerschaft mit beschränkter Berufshaftung von Rechtsanwälten, Steuerberatern und Solicitors · Sitz: Frankfurt am Main · AG Frankfurt am Main PR 2669

Regulatory information pursuant to Sec. 5 DDG und §§ 2, 3 DL-InfoV: www.cliffordchance.com/deuregulatory

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Delhi • Dubai • Düsseldorf • Frankfurt • Hong Kong • Houston • Istanbul • London • Luxembourg • Madrid • Milan • Munich • Newcastle • New York • Paris • Perth • Prague • Riyadh* • Rome • São Paulo • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

*AS&H Clifford Chance, a joint venture entered into by Clifford Chance LLP.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.

The Capital Markets Guide
is also available online