

# ASEAN Regulations for Cross-Border Security Offerings

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# ASEAN Regulations for Cross-Border Security Offerings

## About This Guide

With the advent of the ASEAN Economic Community at the end of 2015, the capital markets practices of Lex Mundi member firms operating in ASEAN have come together to share with clients and stakeholders an overview of the regulations applicable to the cross-border offer of securities within each ASEAN member state. This guide sets out fundamental elements such as the regulatory body, registration and exemption requirements, securities marketing regulations, sponsor or agent engagement requirements as well as any disclosure requirements and relevant considerations.

This guide will primarily serve to benefit issuers and offerors seeking to raise proceeds (equity or debt) in the emerging and frontier markets of ASEAN. Stakeholders involved in the offer process (e.g. Institutional Investors, Private Equity and Fund Management firms) may also find the guide of interest in identifying requirements that need to be met prior to accessing ASEAN capital markets.

## ASEAN Overview

In December 1997, the leaders of Southeast Asian nations jointly made the decision during the 40th anniversary of ASEAN and the 13th ASEAN Summit to transform the region into a stable, prosperous, and highly competitive region with equitable economic development along with reduced poverty and socio-economic disparities.

This summit formed the background of ASEAN Vision 2020, described as:

***“A concert of Southeast Asian Nations, outward looking, living in peace, stability and prosperity, bonded together in partnership in dynamic development and in a community of caring societies.”***

*Key to realising ASEAN Vision 2020 is the successful establishment of the ASEAN Economic Community (AEC), an initiative that consists of the following key characteristics by 2015<sup>1</sup>:*

- a) a single market and production base
- b) a highly competitive economic region
- c) a region of equitable economic development, and
- d) a region fully integrated into the global economy

## AEC's impact to ASEAN Capital Markets

Key to creating a ***single market and production base*** in line with Vision 2020 will be a freer flow of capital amongst all member countries. This key tenet of the AEC will be achieved by the strengthening of the ASEAN capital markets, as well as allowing for greater capital mobility between ASEAN member states.

To this end, actions proposed by the ASEAN Secretariat and rectified by individual governments include the harmonisation in capital market standards, greater flexibility in language and governing law requirements and the establishment of exchange and debt market linkages including cross-border capital raising activities<sup>2</sup>. Although limited progress has been made on this front at this current moment, the participation of Singapore, Malaysia and Thailand in the ASEAN Trading Link has been heralded as a successful example of how free capital flow can attract foreign inward investment.

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<sup>1</sup> The ASEAN Secretariat. (2008), “ASEAN Economic Community Blueprint”, pp.6

<sup>2</sup> The ASEAN Secretariat. (2008), “ASEAN Economic Community Blueprint”, pp.14-15

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## Survey of ASEAN Regulations

### Applicable Regulatory Body and Market Information

- Securities and Exchange Commission of Cambodia (“SECC”)
- Cambodia Securities Exchange (“CSX”) where the securities are to be listed onshore.
- Three listed companies as of December 2015.
- Market capitalization of approximately USD 176 million as of end 2015.

### Securities Offering and/or Registration and Exemption Requirements

In general, no securities can be sold or offered for sale or distribution within Cambodia without approval from the SECC and unless all requirements in relation to proposed public offer are fully fulfilled and complied with in accordance with the Cambodian securities regulations. The disclosure document in relation to the proposed offer must be registered with the SECC.<sup>3</sup>

The above requirements are not applicable to exempt offer which are:

- (i) an offer which is guaranteed by the Royal Government of Cambodia,
- (ii) an offer of which the price is set for the trading within the ordinary course of trading in the market, and
- (iii) any other offers which are determined by the SECC.<sup>4</sup>

### Marketing of Securities Where Issuer/Sponsor Offshore and Investor Onshore

Onshore offering<sup>5</sup> requires the securities to be registered with the SECC and listed with the CSX<sup>6</sup>. Upon the registration of securities, such offering is to be made and the securities are to be distributed within the territory of Cambodia only.

Cambodian law does not restrict offshore investors from participating and acquiring securities being offered within Cambodia.

Likewise, Cambodian law does not restrict Cambodian investors from participating and acquiring securities being offered offshore; however, issuer/sponsor offshore cannot market its offshore offering<sup>7</sup> to Cambodian public. Furthermore, there is no legal requirement under Cambodian law for offshore issuer/sponsor to notify or report to the SECC upon the completion of the sale of such securities.

<sup>3</sup> Article 12 of the Law on the Issuance and Trading of Non-Government Securities (2007) and Article 5 of the Sub-decree on the Implementation of the Law on the Issuance and Trading of Non-Government Securities.

<sup>4</sup> Article 16 of the Law on the Issuance and Trading of Non-Government Securities (2007) and Article 6 of the Sub-decree on the Implementation of the Law on the Issuance and Trading of Non-Government Securities

<sup>5</sup> “Onshore offering” refers to any offer made in Cambodia by companies incorporated and registered in Cambodia.

<sup>6</sup> Only companies which are incorporated and registered in Cambodia are allowed to be listed on the CS

<sup>7</sup> An offshore offering refers to any offer that is made by entities established outside Cambodia that targets investors in Cambodia.

## Need to Engage Onshore Sponsor, Licensed Placement or Other Distribution Agent

For onshore offering, all players and intermediaries in relation to the securities offering must be registered in Cambodia and licensed/accredited by the SECC. Offshore offering is not permitted in Cambodia.

## Legends or Other Disclosure Requirements on Offering Materials

The Disclosure Document must fulfill the requirement in accordance with the laws and regulations in place.<sup>8</sup> However, the SECC has currently not published any standard legend with regard to the selling restriction. The only current prescribed wordings that are required to be included in the Disclosure Document are (i) the responsible parties with regard to the Disclosure Document<sup>9</sup> and (ii) the note to investors.<sup>10</sup>

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8 In accordance with Article 9 of the Sub-Decree on the Implementation of the Law on Issuance and Trading of Non-Government Securities, the Disclosure Document that is submitted to the SECC for approval and registration shall (1) be a written document; (2) have clear date; (3) set out the conditions related to the public offer, including other conditions with a brief, sufficient, and precise description; (4) contain sufficient information to enable the public and investment advisors to make an assessment by relying on precise information on the rights and obligations attached to the securities being offered, and to evaluate the assets and liabilities, financial situation, strength and weakness of the issuer that has issued or will issue the securities; (5) contain sufficient information and other attached documents along with forms of prescribed disclosure document; (6) contain consent by an expert in case that statement, citation, or references to statements which belong to that expert are included in the disclosure document; and (7) be signed by all members of the governing board of the issuer on the disclosure document.

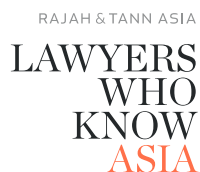
9 The prescribed wording is as follows: "the issuer and relevant persons who prepare the disclosure document shall be responsible for the information containing in this disclosure document."

10 The prescribed note to investors is as follows: "the company's directors have approved this disclosure document for public issuance of equity securities. The board of director collectively and individually takes full responsibility for the accuracy of the information contained in this document. Having made all reasonable enquires and to the best of his/her knowledge and belief, the board assures there is no false or misleading statement or other facts if omitted would make any statement in this document false or misleading. The company's directors have approved this disclosure document for public issuance of equity securities. The board of director collectively and individually takes full responsibility for the accuracy of the information contained in this document. Having made all reasonable enquires and to the best of his/her knowledge and belief, the board assures there is no false or misleading statement or other facts if omitted would make any statement in this document false or misleading. The secc has approved our public offering and a copy of this disclosure document has been registered and filed with the secc. The approval and registration of this disclosure document is not an indication that the secc neither recommends to subscribe this securities offering nor assumes responsibility for the accuracy of information, opinion or statement contained in this disclosure document. The secc is neither liable for any non-disclosed information and the content of this disclosure document, nor certify the accuracy or completeness. The secc is not liable for any loss that investors may suffer from a whole or part of this disclosure document content. Investors should rely on his/her own valuations to assess the accuracy and risks related to the public offering to invest in the company by considering the objective of the investment, risk profile, his/her own financial position and so on. If investors have any doubt about this disclosure document or in considering the investment, they should consult with securities firms, investment advisors, or other professional advisers."

## Other Relevant Considerations

The Royal Government of Cambodia has recently put in place a tax incentives scheme for companies intent on listing in order to promote and encourage public listing.<sup>11</sup>

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<sup>11</sup> On 08 January 2015, the Royal Government of Cambodia issued Sub-Decree No. 01 ANKr.BK on Incentives in the Securities Sector ("Sub-Decree"), which aims to determine the various types, activities and conditions which could be granted with tax incentives in the securities sector. This Sub-Decree covers two types of securities players: (1) company/enterprise issuing for the sale of equity securities and/or debt securities which are licensed by the SECC, and registered as securities trading in the permitted securities market and (2) public investors holding and/or purchasing-selling state securities, equity securities, and/or debt securities which are issued for sale to the public, and registered as securities trading in the permitted securities market. Public investors include both residence and non-residence investors. The offered incentives are as follows:

-50% Reduction of Tax on Profit: This incentive is the reduction of profit tax for 50% of the profit tax to be paid and is offered for a period of three years. Company/enterprise issuing for sale equity securities and/or debt securities, licensed by the SECC and registered as securities trading at the permitted securities market within a period of 03 years starting from the date of this Sub-Decree comes into force shall complete required formalities and submit to the General Department of Taxation through the SECC in order to be granted with tax incentives. This incentive period counts from (i) the beginning of the tax year that such securities are issued for sale to the public, in case such issuances are made within six months of the beginning of the tax year and (ii) the beginning of the tax year after the tax year that such securities are issued for sale to the public, in case such issuances are made within six months of the end of the tax year.

-Tax Amnesty: Company/enterprise issuing for sale equity securities and/or debt securities, licensed by the SECC and registered as securities trading at the permitted securities market shall be granted with tax amnesty for 5 (five) years, commencing from the date this Sub-Decree enters into force. Such tax amnesty is granted on the condition that (i) tax debt on profit founded by the independent auditor, after the General Department of Taxation ("GDT") has done comprehensive audit; and (ii) tax debt on profit founded from re-audit by the GDT, after the GDT has done comprehensive audit.

-50% Reduction of Withholding Tax: Finally, Article 6 of this Sub-Decree grants public investors the reduction of 50% (fifty per cent) on the withholding tax on the interest and/or premium received from the holding and/or purchase-sale of the state securities, equity securities and debt securities for a period of 03 (three) years commencing from the date of this Sub-Decree entering into force.



## Survey of ASEAN Regulations

### Applicable Regulatory Body and Market Information

- Financial Services Authority (“FSA”)
- Indonesia Stock Exchange (“IDX”) where the securities are to be listed onshore
- 521 listed companies as of 11/12/15.
- Market capitalization of IDR 4,726 trillion/USD 336.01 billion as of 11/12/15.

### Securities Offering and/or Registration and Exemption Requirements

In general, no offering of security<sup>12</sup> with a total of a value of Indonesian Rupiah 1 billion (approx. USD<sup>13</sup> 70,000) or more, within Indonesia or to Indonesian citizens abroad, made either through the mass media or otherwise to more than 100 persons or results in sales to more than 50 persons (“**Public Offering**”), can take place without a registration statement duly filed with and rendered effective by the FSA.

An offering of securities will never be a public offering if the total consideration to be received by the offeror is less than Rupiah 1 billion.

If the total consideration to be received by the offeror in respect of the offering of securities is equal to or exceeds Rupiah 1 billion, the offering is nevertheless not considered a public offering if:

- a) It is not made through the mass media (e.g., newspapers, magazines, television, radio, films and other electronic media) regardless of how many persons it is made to<sup>14</sup>; or
- b) it is not made through letters, brochures, other printed matter or otherwise distributed to more than 100 persons; or
- c) it does not result in sales to more than 50 persons; or
- d) the securities sold are debt securities with a tenor of less than one year.

In the determination whether there has been an offering of securities to more than 100 persons, it does not matter whether the offering is followed by the purchase of securities. In the determination of the number of recipients of the sale of securities (i.e., whether the securities are sold to more than 50 persons), it is the actual purchase of the securities that count, irrespective of whether or not such purchases are associated with an offer.

<sup>12</sup> the term “securities” includes promissory notes, commercial paper, shares, bonds, evidences of indebtedness, participation units of collective investment contracts, futures contract related to securities, and all derivatives of securities (such as options and warrants)

<sup>13</sup> Exchange rate on September 11, 2015: 1 USD = IDR 14,300.

<sup>14</sup> A potential investor can be invited to a presentation on securities in the Indonesian jurisdiction without triggering the Public Offering regulation, if the invitation is not made through the mass media and not otherwise (through mail, e-mail, telephone etc.) distributed to more than 100 persons and not more than 50 persons will purchase the securities following the invitation.

## Marketing of Securities Where Issuer/Sponsor Offshore and Investor Onshore

When there is any public offering, the securities are required to have been registered with the FSA and listed with the IDX (if applicable).

Offering of securities by offshore issuers not considered public offering<sup>15</sup> is exempt from registration.

## Need to Engage Onshore Sponsor, Licensed Placement or Other Distribution Agent

None, as long as the transaction is “exempt.”

## Legends or Other Disclosure Requirements on Offering Materials

Recommended.<sup>16</sup>

## Other Relevant Considerations

There are certain tax consequences for the personnel of the sponsor conducting marketing or offering in Indonesia.<sup>17</sup>

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<sup>15</sup> An issuer may send the required documents, such as (a) private placement memorandum, (b) application form, and (c) marketing presentation giving details about the investment as long as the communication of information does not qualify as a Public Offering.

<sup>16</sup> Selling restrictions typically contain statements substantially in the form of the following: this offering does not constitute a public offering in indonesia under law number 8 of 1995 regarding capital markets. This offering document may not be distributed in indonesia and the securities may not be offered or sold, directly or indirectly, in indonesia or to indonesian citizens wherever they are domiciled, or to indonesia residents in a manner which constitutes a public offering under the laws and regulations of indonesia.

<sup>17</sup> Indonesia tax laws and regulations consider any person that is actually in Indonesia for over 183 days in aggregate in any calendar year to be a permanent establishment for income tax purposes. Thus, such a person becomes liable for income tax to the Indonesian government. Indonesia operates a worldwide income tax system on its residents.

## Survey of ASEAN Regulations

### Applicable Regulatory Body and Market Information

- Lao Security Commission (“LSC”)
- Lao Security Exchange (“LSX”) where the securities are to be listed onshore.
- Five listed companies as of 11/12/15.
- Market capitalization of KIP 10,969 billion/USD 1.35 billion as of 11/12/15.

### Securities Offering and/or Registration and Exemption Requirements

Under applicable regulations, all securities to be sold or offered onshore shall be registered with LSC and there is no exemption to this requirement. As of this publication, there is no onshore offering by offshore issuers and although applicable regulations do not clearly provide whether the registration requirements applies to onshore offering by offshore issuers, LSC’s interpretation is that it applies to both onshore and offshore issuers.

### Marketing of Securities Where Issuer/Sponsor Offshore and Investor Onshore

Where any offer of securities occurs onshore, then the securities are required to have been registered with the LSC and listed with the LSX.

### Need to Engage Onshore Sponsor, Licensed Placement or Other Distribution Agent

Required.

### Legends or other Disclosure Requirements on Offering Materials

Required.

### Other Relevant Considerations

N/A

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## Survey of ASEAN Regulations

### Applicable Regulatory Body and Market Information

- Securities Commission Malaysia (“SC”)
- 920 listed companies: 811 listed companies under Main Market, 109 listed companies under ACE market as of 02/16.
- Market capitalization is RM 1.7 Trillion/USD 434.63 billion as of 31/12/15.

### Securities Offering and/or Registration and Exemption Requirements

A person who offers securities in Malaysia must obtain recognition from the SC and register a disclosure document, unless exempted.

Wholly exempt transactions (which are exempted from both SC recognition and disclosure document registration requirements) include offerings pursuant to employee share scheme, bonus issue, scrip dividend, rights issue, and take-over offers.

Partially exempt transactions (which are exempted from the SC recognition requirement but still require SC registration of a disclosure document) include offerings to holders of capital markets services licence, high-net worth individuals and entities<sup>18</sup>.

Further, a prospectus must be registered with the SC unless it is an excluded offer. Excluded offers include: offers to holders of capital markets services licence, high-net worth individuals and entities, offers pursuant to employee share scheme, bonus issue, scrip dividend, rights issue, and take-over offers.

### Marketing of Securities Where Issuer/Sponsor Offshore and Investor Onshore

It is the act of making an offer onshore (including marketing or promotional activity carried out onshore) that triggers the regulations, regardless of whether the offeror is offshore.

### Need to Engage Onshore Sponsor, Licensed Placement or Other Distribution Agent

In respect of certain partially exempt transactions, the distribution of the securities must be made by a holder of a capital markets services licence who carries on the business of dealing in securities<sup>19</sup>.

<sup>18</sup> High-net worth individual means an individual whose total net personal assets exceed RM 3 million (excluding the value of his primary residence) or whose gross annual income exceed RM 300,000. High-net worth entity means a corporation with total net assets exceeding RM 10 million.

<sup>19</sup> Dealing in securities is a regulated activity under the Capital Markets and Services Act 2007.

## Legends or Other Disclosure Requirements on Offering Materials

The SC Prospectus Guidelines require the following to be stated - "The Securities Commission Malaysia has approved the issue, offer or invitation for the offering (where applicable) and a copy of this prospectus has been registered with the Securities Commission Malaysia. The approval, and registration of this prospectus, should not be taken to indicate that the Securities Commission Malaysia recommends the offering or assumes responsibility for the correctness of any statement made or opinion or report expressed in this prospectus. The Securities Commission Malaysia has not, in any way, considered the merits of the securities being offered for investment. The Securities Commission Malaysia is not liable for any non-disclosure on the part of the company and takes no responsibility for the contents of this document, makes no representation as to its accuracy or completeness, and expressly disclaims any liability for any loss you may suffer arising from or in reliance upon the whole or any part of the contents of this prospectus."

## Other Relevant Considerations

All income of companies and individuals accrued in or derived from Malaysia are liable to Malaysian income tax. Income of foreign enterprises engaged in a trade or business in Malaysia through a permanent establishment is liable to Malaysian income tax.

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The logo for SKRINE, featuring the word "SKRINE" in a large, bold, red serif font.

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# Myanmar

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## Survey of ASEAN Regulations

### Applicable Regulatory Body and Market Information

- Securities and Exchange Commission of Myanmar (“SEC”)
- Yangon Stock Exchange Joint-Venture Company Limited
- Yangon Stock Exchange opened 09/12/15.
- No companies listed currently. An initial 6 companies may be listed in early 2016.

### Securities Offering and/or Registration and Exemption Requirements

Under the Securities Exchange Law<sup>20</sup> 2013, a public company making a public offering<sup>21</sup> of marketable securities is required to submit the requisite process documents to SEC and obtain SEC’s approval for the public offering. Such process documents include the prospectus, memorandum and articles of association, audited financial statements for the preceding 2 financial years and other information prescribed by the SEC.

The public company is also required to make public a prospectus containing important company information together with its memorandum and articles of association.

Under the Securities Exchange Law 2013 and the Securities Exchange Rules 2015, there are no exemptions from the above requirements.

### Marketing of Securities Where Issuer/Sponsor Offshore and Investor Onshore

There is no provision in the Securities Exchange Law 2013 or the Securities Exchange Rules 2015 for the marketing of securities where the issuer/sponsor is offshore and the investor is onshore.

<sup>20</sup> The definitions of certain terms such as “public company” and “prospectus” are set out in the Myanmar Companies Act 1914 (which is in the process of being revised and updated) instead of the Securities Exchange Law 2013. “Public company” is defined in the Companies Act 1914 instead of the Securities Exchange Law 2013 and means a company incorporated under the Companies Act 1914 or under the Indian Companies Act 1882, the Indian Companies Act 1866, or under any Act repealed thereby, which is not a private company. “Private company” is defined in the Companies Act 1914 to mean a company which by its articles: (a) restricts the right to transfer the shares, if any, (b) limits the number of its members to fifty not including persons who are in the employment of the company and (c) prohibits any invitation to the public to subscribe for the shares, if any, or debentures of the company, Provided that where two or more persons hold one or more shares in a company jointly they shall, for the purposes of this definition, be treated as a single member.

<sup>21</sup> There is no definition of “public offer” or “public” under the Securities Exchange Law 2013, the Securities Exchange Rules 2015 or the Companies Act 1914.

## Need to Engage Onshore Sponsor, Licensed Placement or Other Distribution Agent

There is no provision in the Securities Exchange Law 2013 or the Securities Exchange Rules 2015 under which the issuer is required to engage an onshore sponsor, licensed placement or other distribution agent.

## Legends or Other Disclosure Requirements on Offering Materials

There is no mandatory health warning legend or disclosure prescribed under the Securities Exchange Law 2013 or Securities Exchange Rules 2015. However, this is subject to any disclosure that may be prescribed by the SEC from time to time.

## Other Relevant Considerations

The Yangon Stock Exchange is targeted to commence operations in late 2015.

The Securities Exchange Law 2013 provides that the SEC has the power to specify additional conditions pertaining to the issuance of marketable securities.

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# Philippines

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## Survey of ASEAN Regulations

### Applicable Regulatory Body and Market Information

- Securities and Exchange Commission (“SEC”)
- Philippine Stock Exchange, Inc. (“PSE”) where the securities are to be listed onshore.
- 265 companies listed as of 14 December 2015.
- Market Capitalization of PHP 13.21 trillion/USD 293.5 billion as of 2015.

### Securities Offering and/or Registration and Exemption Requirements

In general, no security can be sold or offered for sale or distribution within the Philippines without a registration statement duly filed with and rendered effective by the SEC.

Among others<sup>22</sup>, offerings which are (1) to less than 20 persons in the Philippines in any 12-month period and (2) to qualified buyers<sup>23</sup> are exempt from registration. Also, the issuance of (1) debt instruments to qualified buyers<sup>24</sup> and (2) securities issued or guaranteed by multilateral financial entities (MFE), or by facilities or funds established, administered, and supported by MFEs<sup>25</sup> are also exempt. Underwriters involved in the onshore transaction must have been licensed to engage in such activities in the Philippines by the SEC.

22 The other transactions considered safe harbors from the registration requirement are: (a) an isolated transaction where no underwriter is involved; (b) mortgage notes sold to a single purchaser at a single sale secured by real estate or tangible personal property; (c) exchanges of a security pursuant to a right of conversion provided that the security surrendered was, when sold, exempt from registration or registered with the SEC; (d) broker’s transactions on customer orders on a registered exchange; (e) an exchange of securities by the issuer with its existing security holders exclusively, where no commission or other remuneration is paid or given for the solicitation of such an exchange

23 The following have been classified as qualified buyers by the SEC: (a) Banks; (b) Registered investment houses; (c) Insurance companies; (d) Pension funds or retirement plans maintained by the Government of the Philippines or any political subdivision thereof or managed by a bank or other persons authorized by the Philippine central bank (“BSP”) to engage in trust functions; (e) Investment companies; or (f) Such other person as the SEC may by rule determine as qualified buyers, on the basis of such factors as financial sophistication, net worth, knowledge, and experience in financial and business matters, or amount of assets under management.

24 Banks, registered investment houses, insurance companies, pension funds or retirement funds maintained by the Government of the Philippines or any of its political subdivision or managed by a bank or other persons authorized by the Bangko Sentral ng Pilipinas to engage in trust functions, investment companies, or such other persons as the SEC may, by rule, determine as qualified buyers on the basis of such factors as financial sophistication, net worth, knowledge, experiences in financial and business matters, or amount of assets under management.

25 To be exempt from registration, the MFEs must be established through a treaty or any other binding agreement to which the Philippines is a party or subsequently becomes a member. MFEs include international financial institutions, multilateral development banks, development finance institutions, or any other similar entities. In lieu of registration, the issuer is required to file a disclosure to the SEC indicating, among others, information about the issuer and the security to be issued, information about the MFE, and information about the guarantee.



## Marketing of Securities Where Issuer/Sponsor Offshore and Investor Onshore

Where any offer of securities occurs onshore, then the securities are required to have been registered with the SEC and listed with the PSE (if applicable). It is the act of making an offer onshore that triggers the regulations, regardless of where the sale may be settled or the securities issued/held. The execution of documents and transmittal of funds from onshore would indicate that such an offer should have been registered although not solely determinative of whether a regulated offer has taken place.

Generally no requirement of registration or notification, if all aspects of the offer remain offshore and it can be proven that onshore investor went offshore to receive the offer.<sup>26</sup>

## Need to Engage Onshore Sponsor, Licensed Placement or Other Distribution Agent

None as long as the transaction is “exempt”.

## Legends or Other Disclosure Requirements on Offering Materials

Required.<sup>27</sup>

## Other Relevant Considerations

There are certain tax consequences to being deemed as having conducted business in the Philippines without a license for both the sponsor and its personnel.<sup>28</sup>

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<sup>26</sup> As a general rule, if the activities of the financial sponsor are conducted outside of the Philippines, these are factors that contribute to a determination that no business is being conducted in the Philippines. For example, would be permissible to send any marketing materials from offshore electronically or by granting access to a website maintained offshore.

<sup>27</sup> Selling restrictions typically contain statements substantially in the form of the following: the philippine securities and exchange commission has not approved these securities or determined if this offering document is accurate or complete. Any representation to the contrary is a criminal offense and should be reported immediately to the philippine securities and exchange commission. Securities will be offered in the philippines only pursuant to exemptions under the securities regulation code (the “src”). Accordingly, securities may not be offered or sold or made the subject of an solicitation for subscription or purchase nor may this offering document or any other document or material in connection with the offer or sale, or solicitation for subscription or purchase, of securities be circulated or distributed whether directly or indirectly to any person in the republic of the philippines except in a transaction exempt from the src’s registration requirements under section 10 of the src. The securities being offered or sold have not been registered with the philippine securities and exchange commission under the src. Any future offer or sale thereof is subject to registration requirements under the src unless such offer or sale qualifies as an exempt transaction.

<sup>28</sup> Philippine tax laws and regulations consider any person that is actually in the Philippines for over 180 days in any calendar year to be a “non-resident alien engaged in trade or business in the Philippines” for income tax purposes. Thus, such a person becomes liable for income tax to the Philippine government for all earnings derived from Philippine sources at the rate of 32% for individuals and for entities deemed doing business in the Philippines the applicable rate is 30%.

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## Survey of ASEAN Regulations

### Applicable Regulatory Body and Market Information

- Monetary Authority of Singapore (“MAS”)
- Singapore Exchange Securities Trading Limited (“SGX-ST”) where the shares or debentures are to be listed onshore
- 769 listed companies as of 2015.
- Market Capitalization of SGD 930,559 million/ USD 659.92 billion as of 2015.

### Securities Offering and/or Registration and Exemption Requirements

In general, no offer of shares or debentures can be made to persons in Singapore without a duly lodged and registered prospectus (containing prescribed information) with the MAS.

There are exemptions from the requirement to lodge and register a prospectus with MAS set out in the Securities and Futures Act (Chapter 289) of Singapore (the “SFA”)<sup>29</sup>, some of which, such as small offers, offers to no more than 50 persons and offers to accredited investors, have advertising restrictions and/or restrictions on selling or promotional expenses.

Resale restrictions generally apply if certain prospectus exemptions are relied upon.

An offer by an entity whose shares or debentures are listed on the SGX-ST, whether by means of a rights issue or otherwise, may be made without a prospectus if it is made in or accompanied by an offer information statement in the form prescribed which is lodged with the MAS, subject to conditions.

If the shares or debentures are to be listed on the SGX-ST, the prospectus must comply with additional disclosure requirements in the SGX-ST’s Listing Manual. The requirements in the SGX-ST Listing Manual are beyond the scope of this guide.

<sup>29</sup> The exemptions from prospectus requirements include, amongst others: (a) Small personal offers where the total amount raised from such offers within any 12-month period does not exceed \$5 million (or such other amount as may be prescribed by the MAS) under certain conditions; (b) An offer to no more than 50 persons within any period of 12 months and under certain conditions; (c) An offer made in connection with (i) a take-over offer which is in compliance with the Take-over Code, (ii) an offer for the acquisition of all or some of the shares in an unlisted corporation (being a corporation that is not incorporated in Singapore and listed on the SGX-ST) (“unlisted corporation”) to all members of the corporation in compliance with applicable laws and requirements, or (iii) a proposed compromise or arrangement between the unlisted corporation and its creditors or members, and such compromise or arrangement is in compliance with applicable laws and requirements; (d) an offer to enter into an underwriting agreement relating to shares or debentures; (e) Certain offers of shares or debentures of an entity (not being listed in Singapore or corporation not incorporated in Singapore with a secondary listing in Singapore made to existing members or debenture holders of that entity, (f) an offer of shares or debentures of any entity listed on the SGX-ST made to its existing members or debenture holders, (g) an offer of debentures of an entity whose debentures are listed on the SGX-ST, to its existing debenture holders, (h) an offer to qualifying persons like employees of the corporation or its related corporations under specified conditions; (i) an offer to specified persons, including accredited investors under certain conditions; (j) an offer of debentures made by or guaranteed by the Singapore government or an international financial institution of which Singapore is a member; (k) offer of shares or debentures which are issued for no consideration; (l) offers of shares or debentures to institutional investors which include, among others: banks, registered finance companies, registered trust companies, pension funds and the Government; and (m) offer in respect of certain international debentures denominated in foreign currency offered by appropriately licensed/exempt persons and subject to certain conditions.

## Marketing of Securities Where Issuer/Sponsor Offshore and Investor Onshore

Offers made offshore to onshore investors may still attract regulation due to the extra-territorial application of the SFA. Therefore, prospectus requirements may still apply to an offer of shares or debentures outside Singapore without a prospectus, targeted at persons in Singapore.

However, if all aspects of the offer of shares or debentures are outside Singapore and an investor in Singapore is made the offer outside Singapore, it is unlikely that the offer will attract prospectus requirements. An offshore issuer can also rely on prospectus exemptions.

There may additionally be licensing issues under the SFA depending on the mode of offering (Please refer to 'Other Relevant Considerations' listed below).

## Need to Engage Onshore Sponsor, Licensed Placement or Other Distribution Agent

Yes.<sup>30</sup>

## Legends or Other Disclosure Requirements on Offering Materials

Required.<sup>31</sup>

## Other Relevant Considerations

A person making an offer of shares or debentures may be deemed to be carrying on business in dealing in securities and thus require a capital markets services license. However, such person (assuming he/it is an issuer) may work with a licensed or exempt dealer to distribute the shares or debentures solely for the person.

In addition, foreign companies which carry on business in Singapore are required to register under the Companies Act (Chapter 50 of Singapore). If a company makes gains or profits from any trade or business in Singapore, such gains or profits constitute income that is subject to tax.

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30 If a person wishes to market shares or debentures through direct mailings, telephone calls or in-person visits, the use of a local intermediary licensed to deal in securities (or exempted from the relevant licensing requirements) would be required, unless they fall within a licensing exemption. Licensing obligations under the SFA will be triggered if the content of any website is utilized to market shares or debentures and targeted at Singapore investors.

31 If a person wishes to rely on the prospectus exemptions for small offers, he must give the following statement in writing to the person to whom he makes the offer: "This offer is made in reliance on the exemption under section 272A(1) of the Securities and Futures Act. It is not made in or accompanied by a prospectus that is registered by the Monetary Authority of Singapore." If a person wishes to rely on the prospectus exemptions to institutional investors and relevant persons such as accredited investors, there is no prescribed disclosure language under law but the market practice is to include language informing the offeree of the reselling restriction. We have included a sample, but please note that this should not be used as a precedent as the language may need to be catered to the specific document: "The document has not been and will not be registered as a prospectus with the Monetary Authority of Singapore. Accordingly, the document and any other document or material in connection with the offer or sale, or invitation for subscription or purchase, of the shares / debentures may not be circulated or distributed, nor may the shares / debentures be offered or sold, or be made the subject of an invitation for subscription or purchase, whether directly or indirectly, to persons in Singapore other than (i) to an institutional investor (as defined in Section 4A of the Securities and Futures Act (Chapter 289) of Singapore (the "SFA") ("Institutional Investor")) pursuant to Section 274 of the SFA, (ii) to a relevant person (as defined in Section 275(2) of the SFA) ("Relevant Person") pursuant to Section 275(1) of the SFA, or any person pursuant to Section 275(1A) of the SFA, and in accordance with the conditions specified in Section 275 of the SFA or (iii) otherwise pursuant to, and in accordance with the conditions of, any other applicable provision of the SFA."

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## Survey of ASEAN Regulations

### Applicable Regulatory Body and Market Information

- Securities and Exchange Commission (“SEC”)
- The Stock Exchange of Thailand (“SET”) where the securities are to be listed onshore.
- 639 listed companies as of 31/01/15.
- Market capitalization of THB 12,898.70 billion/ USD 359.49 billion as of 31/01/15.

### Securities Offering and/or Registration and Exemption Requirements

Generally, offering for sale of any securities to the public in Thailand is prohibited unless an approval from the SEC is obtained (mandatory for newly issued securities only) and the registration statements and draft prospectus have been filed with the SEC and become effective. Furthermore, after the sale is completed, a report of the result of sales shall be submitted to the SEC.

#### Foreign Shares<sup>32</sup>

Currently, the SEC accepts applications for approval to offer for sale to the public (Public Offering) of foreign shares only in the following scenarios:

- a) For primary listing on the SET
- b) For dual listing on both foreign exchange and the SET, and
- c) Without listing on the SET (only permissible to shares of ASEAN corporations already listed or wishing to be listed on any stock exchange in ASEAN).

#### Exemptions

The above SEC approval and filing requirements are exempted in the case of offering for sale of foreign shares under the following circumstances/conditions:

- a) Private placement of foreign shares which are defined as either one of the following manners:
  - (i) Made to no more than 50 investors within the period of 12 months;
  - (ii) An offer for sale of shares in an aggregate value of not exceeding THB 20 million within the period of 12 months, provided that the calculation of the aggregate value of such offered shares shall be based on the offering price of the shares;
  - (iii) An offer for sale of shares to Institutional Investors<sup>33</sup>; or

<sup>32</sup> The duty to submit report of result of sale shall, nevertheless, still apply to these exempted offering for sale of foreign shares.

<sup>33</sup> Institutional Investors is defined to include 13 different types of investors, such as commercial banks; finance companies; securities companies; credit foncier companies; insurance companies; government units and state enterprises, etc.

(iv) An offer for sale of shares where the seller and the purchaser are shareholders of the company who issues the shares and it is not an offer for sale in a general basis.

b) An offer for sale of foreign shares to directors or employees under Employee Stock Option Plan (ESOP) of such foreign company or its affiliate in Thailand.

## Foreign Debentures (Government Bonds or Corporate Bonds)

Offering for sale of foreign bonds is generally permissible. For foreign bonds issued in Thai Baht currency, pre-approval from the Ministry of Finance shall be obtained and it is currently granted to foreign bonds from ASEAN countries, China, Japan and South Korea only.

Offering of foreign bonds issued in foreign currency will be approved if it is from a member state that is a signatory on Appendix A of the IOSCO.

The SEC imposes different rules and conditions, such as terms & conditions, registration of transfer restrictions, debenture holders' representative, filing, rating, etc., for different circumstances of offering, such as private placement or public offering.

## Exemptions

Although approval from the SEC is deemed granted for all cases, submission of draft terms & conditions to the SEC is still required. Filing of registration statements and draft prospectus are exempted in the certain circumstances, including but not limited to the following:

- (i) A private placement of newly issued government bonds or corporate bonds to no more than 10 investors within any 4 month period (with registration of transfer restriction);
- (ii) An offer for sale of government bonds or corporate bonds issued by international financial institutions under the obligation prescribed and approved by the Ministry of Finance as per the name list notified by the SEC Office;
- (iii) The offer for sale of newly issued corporate bonds in Thailand to no more than 10 commercial banks under the law on financial institution business within any 4 month period.

## Foreign Collective Investment Scheme (CIS)

Shares in a foreign investment company set up under CIS can be offered for sale in Thailand and exempted from SEC approval and filing requirements only under the following circumstances:

1. CIS from ASEAN countries<sup>34</sup> (ASEAN CIS) - Offering of ASEAN CIS units to accredited investors, i.e. institutional investor or high net worth investor in Thailand, is subject to various conditions, including but not limited to, a) being managed by a qualifying CIS operator; b) the units are also being offered for sale in the home country; c) the units are offered and sold in Thailand via a Thai licensed brokerage firm; d) having a local representative in Thailand, etc.

<sup>34</sup> Currently, only CIS from Malaysia and Singapore can be offered for sale in Thailand.

Offering of CIS units to retail investors (general investors) in Thailand is subject to extra conditions (in addition to those applicable to Accredited Investors), including but not limited to, a) the home regulator has jointly signed with the SEC the Memorandum of Understanding on Streamlined Authorization Framework for Cross-border Public Offers of ASEAN CIS; b) details of the CIS scheme being consistent with the Handbook for CIS Operators of ASEAN CISs Part I and Part II; c) properly providing any channel to settle the dispute by any other measure other than court, unless the scheme specifies to comply with the Dispute Resolution and Enforcement Mechanism (“DREM”), etc.

2. CIS in the form of Foreign Exchange Traded Funds (ETFs) - Offering of foreign ETFs to investors in Thailand is subject to various conditions, including but not limited to, a) the home exchange being a member of WFE; b) the home regulator being a member of IOSCO; c) having objectives to create returns for unit holders with direct variation to certain variables, such as gold price, crude oil index, commodity index, etc.; d) the ETF operator appointing a contact person in Thailand for the purpose of coordinating and facilitating the prescribed matters in Thailand, etc.

## Marketing of Securities Where Issuer/Sponsor Offshore and Investor Onshore

The same general requirements (as mentioned in the left column) apply to offering for sale of foreign securities cross-border to investors in Thailand, i.e. SEC approval, filing, and report of result of sale.

The term “offering for sale to the public” is interpreted broadly by the SEC. It is deemed to include any solicitation, marketing activities or attempt to approach any number of Thai investors by a foreign issuer and presenting that it is ready to trade or accept orders to trade foreign securities.

It is a practical exemption tolerated by the SEC (not express legal exemption) that a foreign offeror can respond to an unsolicited request made by a prospective investor from Thailand (“reverse inquiries”) which should not be deemed offering or marketing by that foreign offeror.

## Need to Engage Onshore Sponsor, Licensed Placement or Other Distribution Agent

Offering and sale of foreign securities via a Thai licensed securities company would not avoid the general marketing prohibition, except for ASEAN CIS (please see previous section “Securities Offering and/or Registration and Exemption Requirements”).

## Legends or Other Disclosure Requirements on Offering Materials

No mandatory legends. Nevertheless, in the case of private placement (when applicable), any statement similar to the following is recommended when distributing offering materials:

*“This document is distributed on a confidential basis to the person to whom it is addressed. This document may not be reproduced in any form or transmitted to any person other than the person to whom it is addressed.”*



## Other Relevant Considerations

1. The scope of this survey is limited to offering for sale of foreign shares and debentures in Thailand. Offering of other types of foreign securities, such as units of mutual fund, warrants, certificates, derivatives, financial instruments, etc. are not covered and may be subject different market prohibition and exemptions.
2. Certain tax consequences derived from cross-border transactions as well as the repatriation of capital, both inbound and outbound, shall be observed.
3. Notwithstanding the exemptions permitted by the SEC as summarized in this survey, the foreign offeror should observe that certain types of Institutional Investors are governed by specific laws which may impose limits on their capability to invest in foreign securities. In addition, rules and restrictions under exchange control regulations by the Bank of Thailand always apply when Thai investors send funds offshore to invest in foreign securities.

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# Vietnam

Prepared by Lex Mundi, Tilleke & Gibbins  
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## Survey of ASEAN Regulations

### Applicable Regulatory Body and Market Information

- The State Securities Commission of Vietnam (“SSC”)
- Ho Chi Minh Stock Exchange (“HOSE”), and Hanoi Stock Exchange (“HNX”) are regulatory bodies of which SSC is the principal regulator.
- 373 listed companies Hanoi Stock Exchange (HNX):
- Market Capitalization of approximately VND 150,983 billion/ USD 6.7 billion as of 2/12/15.
- 314 listed companies Ho Chi Minh Stock Exchange (HOSE) as of 2/12/15.
- Market Capitalization of VND 985,258 billion/ USD 43.7 billion as of 2/12/15.

### Securities Offering and/or Registration and Exemption Requirements

In Vietnam, an offer of shares to the public by a joint-stock company is different from the listing of the shares of such company on a stock exchange. There are two stock exchanges, namely, HOSE (in Ho Chi Minh City) and HNX (in Hanoi). Below are the main requirements for the offer and the listing of securities (including shares and bonds) of a foreign issuer in Vietnam:

For the offer of shares to the public, a foreign issuer must meet the following requirements:

- The shares must be denominated in Vietnam dong (“VND”);
- Business and production operations in the year immediately prior to the year of the public offering were profitable in accordance with international accounting standards;
- There is an investment project in Vietnam which is approved by the Vietnamese authority(ies) and a plan for the issue and utilization of proceeds for the project development;
- The total amount of money raised from the sale offer must not exceed 30% of the total investment capital of the project;
- There is an undertaking to underwrite the issue in the form of a firm commitment from at least one Vietnam-based securities company;
- There is a bank supervising the utilization of proceeds;
- The foreign issuer must undertake that it will not remit the sale proceeds offshore, and will comply with the law on foreign exchange control in respect of issue of securities in Vietnam (i.e., opening and maintaining a VND-denominated bank account at a Vietnam based licensed bank, all the proceeds and payments in relation to the issue must be made via this bank account); and

- There is an undertaking from the general meeting of shareholders in the case of public offers of convertible shares or convertible bonds (or an undertaking from the board of management<sup>35</sup> or the members' council<sup>36</sup> in the case of public offers of bonds) to trade the securities on a stock exchange within one year from the completion date of the sale.

For the listing of bonds, a foreign issuer must meet the following requirements:

- The bonds must be denominated in Vietnam dong;
- The bonds have already been approved for public sale in accordance with the law on securities of Vietnam;
- The number of to-be-listed bonds is same as that that permitted to be sold to the public;
- Having satisfied the conditions for listing in either HOSE or HNX;
- The listing company provides an undertaking to fully discharge all its obligations in accordance with the law of Vietnam;
- Having been consulted by a securities company established and operating in Vietnam for listing of the bonds; and
- Complying with the law of Vietnam on foreign exchange control.

To our knowledge, there has not been any successful offer for sale to the public and listing of securities by foreign issuers in Vietnam so far.

## Marketing of Securities Where Issuer/Sponsor Offshore and Investor Onshore

No specific rules are available. Rather, general rules for domestic issuers are applicable to foreign issuers. In particular, an issuer is prohibited from the following:

- Directly or indirectly engaging in any act of cheating, deception, or making any untrue statement or omission of necessary information that would cause material misleading and influence the activities of public securities offering and listing;
- Making disclosure of untruthful information in order to incite or entice other persons to buy or sell securities, or making disclosure of insufficient or untimely information that seriously affects the securities price in the market; and
- During the time the SSC reviews the offering registration dossier, the issuer may only use the information described in the prospectus submitted to the SSC to explore the market, provided that it must specify that the information on the date of issue and the securities selling price is a proposal only. In addition, the exploration of markets must not be conducted through the mass media.

## Need to Engage Onshore Sponsor, Licensed Placement or Other Distribution Agent

Please see previous section "Securities Offering and/or Registration and Exemption Requirements".

<sup>35</sup> A board of management in a joint-stock company under Vietnamese company laws is somewhat similar to the board of directors in other jurisdictions.

<sup>36</sup> The term "members' council" under Vietnamese company laws denotes the council of all shareholders in a limited liability company.

## Legends or Other Disclosure Requirements on Offering Materials

- The SSC is empowered to consider and grant the Certificate for Public Securities Offering. In case of refusal, the SSC must explain in writing.
- A Certificate for Public Securities Offering granted by the SSC certifies that the public securities offering has been duly registered in accordance with the Vietnamese laws.
- Within seven calendar days from the date of the Certificate for Public Securities Offering, the issuer must publish the Announcement of Offering in three consecutive issues of a newspaper.
- The distribution of securities may only be made after the issuer ensures that securities buyers are able to access the prospectus.

## Other Relevant Considerations

The actual public offering or listing of securities by a foreign issuer in Vietnam may be more difficult than what the laws require, because it runs against the general policy of Vietnam for attracting foreign investment into Vietnam (rather than a reverse course in which capital from Vietnam flows to a foreign issuer).

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