Hybrid Issuance Regimes for Corporate Bonds in Emerging Market Countries

Analysis, Impact and Policy Choices

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Abstract

Securities regulators in many developing countries are looking for ways to help grow their nongovernment bond markets to finance development. A common challenge is onerous regulations for issuance of bonds, which tend to discourage companies from coming to market. This paper explains and analyzes an issuance framework—a hybrid offer regime (HBOR)—that is particularly suitable for bonds and could help encourage greater issuance and market growth. The HBOR reduces issuance requirements and approval times for bond issuers but maintains certain protections to ensure investor comfort. While certain aspects of this type of issuance have been covered in literature on private placements, the review of hybrid offer regimes, as discussed in this paper, is new and has been evaluated by the WBG. Drawing on the experience of eight countries, the paper

identifies key features of HBORs and highlights important issues for policymakers to consider in their implementation. The findings conclude that the most salient features of HBORs are: i) investment limited to qualified investors, usually institutional and/or high net worth; ii) reduced initial and ongoing disclosures, including exemption from a full prospectus; iii) limited role of the regulator, if any, in the approval process; iv) unrestricted access to secondary market trading for eligible investors; and v) continued provision of antifraud protections against false/misleading statements in disclosures. The paper also looks at issuance trends in three countries and finds that the HBOR may have had a positive impact on encouraging new, less established issuers to come to the bond market.

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Acronyms

AI	Accredited Investor
ALJ	Administrative Law Judge
CMSA	Capital Markets and Services Act (Malaysia)
CRI	Certificado de Recebíveis Imobiliários (Certificate of Real Estate Receivables in Brazil)
CVM	Comissão de Valores Mobiliários (Securities Commission of Brazil)
DD	Disclosure Document
DOJ	Department of Justice
EMC	Emerging Market Country
EU	European Union
FIDC	Fundo de Investimento em Direitos Creditórios (Credit Receivables Investment Fund in Brazil)
HBOR	Hybrid Offer Regime
HNW	High Net Worth
HNWE	High-Net-Worth Entity
HNWI	High-Net-Worth Individual
ICMA	International Capital Market Association
IM	Information Memorandum (Malaysia)
IOSCO	International Organization of Securities Commissions
LF	Letra Financeira (Financial Bill)
LuxSE	Luxembourg Stock Exchange
MBS	Mortgage-Backed Security
MTN	Medium-Term Note
NG	Nongovernment
NGBM	Nongovernment Bond Market
OTC	Over-the-Counter
PO	Public Offer
PP	Private Offer
QIB	Qualified Institutional Buyer
Reg D	Regulation D (United States)
SC	Securities Commission (Malaysia)
SEBI	Securities and Exchange Board of India
SEC	Securities and Exchange Commission
SRO	Self-Regulatory Organization
SVS	Superintendencia de Valores y Seguros (Chile)
TACT	Tel-Aviv Continuous Trading
ThaiBMA	Thai Bond Market Association
TRACE	Trade Reporting and Compliance Engine
WBG	World Bank Group

1. Introduction

Domestic nongovernment bond markets (NGBMs)¹ can serve as an important long-term financing source for developing key sectors, such as infrastructure and housing, in which many emerging market countries (EMCs) face vast shortages.² Private sector solutions through NGBMs are taking on an increasingly critical role to help bridge these types of financing gaps, especially in light of growing constraints on government budgets and banks as a result of the global financial crisis and new regulatory developments. Yet, NGBMs remain underdeveloped and in need of further strengthening in many countries, especially those that are less developed. Increasing the supply of instruments, is one of the most important building blocks in developing the NGBM but also often the most common challenge in EMCs.

A *hybrid offer regime (HBOR)*, an issuance framework for offers targeted at institutional investors, as will be explained below, is an important instrument in a regulator’s toolkit to encourage NG bond issuance and help increase this supply. Its main premise is the sophistication of institutional investors, on which the regulator can rely to reduce certain issuance requirements and thereby facilitate the issuance process. Introducing such regimes is thus an important measure for NGBM development but its implementation requires careful assessment of the country context, with the most important element being the quality of institutional investors and their level of capacity. Where such capacity and sophistication is lacking, which is sometimes the case in EMCs, these regimes would not be appropriate.

This paper analyzes eight cases of HBORs based on a survey conducted by the World Bank Group (WBG) originally in collaboration with the International Organization of Securities Commissions (IOSCO),³ which later included several follow-up inquiries with select countries. The countries analyzed include three developed market cases—the European Union,⁴ Israel, and the United States—and five emerging market cases—Brazil, Chile, India, Malaysia, and Thailand. Although some of the countries included in this note do not necessarily have sizeable corporate bond markets from a global perspective, they exhibit interesting HBOR models that can serve as additional examples for EMCs to consider as they decide on an appropriate path for stimulating their nongovernment (NG) bond issuance. Moreover, many of the EMCs adopted improvements too recently to show a meaningful impact on the size and diversity of their corporate bonds; though, some do show important positive trends, as will be discussed in Section 5.

¹ Nongovernment bonds is used as a broad term to cover fixed income instruments, simple or structured, issued by any entity not directly linked with the federal government, such as corporations, municipalities, state-owned enterprises, projects (e.g., infrastructure), special purpose vehicles (e.g., securitizations), trusts, and funds.

² For example, infrastructure investment needs in EMCs are estimated at close to \$30 trillion over the next 15 years (through 2030) just to keep up with estimated global growth rates of 3.3%. (McKinsey Global Institute 2013)

³ The early findings of the study were included in the IOSCO report “Development of Corporate Bond Markets in Emerging Markets” (November 2011) produced in collaboration with the WBG.

⁴ We focus our analysis on the EU-wide securities regulatory framework instituted by the Prospectus and Transparency Directives.

The objective is to identify common features and aspects that are key for implementing such regimes, not to provide exhaustive information about their every aspect. As such, the findings are intended to increase understanding about the concept of HBORs and provide an overall framework for their implementation. Additional in-depth country-specific analysis would be needed to design detailed requirements and specific features. The WBG continues ongoing research in this area, which may lead to subsequent installments or updates of the study.

The next section sets the stage for why HBORs are particularly important for NG bonds and introduces the concept. Section 3 provides a definition of an HBOR as used in this paper along six key elements—investors, initial disclosure requirements, regulatory approval, secondary market trading, continuous disclosure requirements, and antifraud provisions—compared with the more traditional pure public offer and pure private placement regimes. Section 4 analyzes different types of HBORs used by countries included here along their key characteristics. Section 5 discusses relative importance and impact of HBORs in select countries. Section 6 discusses lessons and recommendations related to certain key aspects of these regimes. Section 7 concludes.

2. Setting the Stage

Because of the relatively illiquid nature of NG bonds due to high fragmentation and low fungibility (see Box 1), efficient operation of primary markets, with emphasis on increasing the issuance of instruments is a key priority for the NGBM development agenda.

One of the typical obstacles to greater issuance of bonds is an inadequate regulatory framework with onerous requirements and uncertain, drawn-out approval processes. Often one-size-fits-all regulations are adopted that are not necessarily conducive to diverse needs of fixed income issuers and their target investors. For example, issuers could be large, established companies, smaller firms accessing capital markets for the first time, or infrastructure projects entering the market on a one-time-only basis. Similarly, investors can vary by their level of sophistication, depending on which they may require more or fewer protections from the securities regulator.

Investors in NG bonds are generally institutional in nature for two reasons. First, institutional investors are better positioned to invest in NG bond instruments because they are assumed to have necessary skills and know-how to analyze and manage risks associated with bond investments, including low liquidity, and understand their often complex features. However, just because a country has institutional investors does not mean that they are sophisticated. Hence, this assumption is country-specific. Second, NG bond investments provide a good fit for institutional investor portfolios, such as those of pension funds and insurance companies, because of their often longer-term maturities commensurate with institutional investors' long-term payout obligations, thus allowing asset-liability matching; in addition, these investments are

attractive because of the opportunities they provide institutional investors to improve portfolio diversification and attain potentially higher returns.⁵

Because of their sophistication, institutional investors do not require the same level of scrutiny by the regulator that is needed for retail investors. Thus, requirements that are meant to protect retail investors will add an unnecessary burden for bond issuers, whose typical investors are not retail. This type of mismatch between issuance requirements and specific capabilities of target investors of NG bonds can serve as a hurdle to greater issuance.

Box 1. Illiquid Nature of Nongovernment Bond Instruments

NG bonds are viewed as relatively illiquid instruments because of their low fungibility, high fragmentation, and relatively small issue size. Unlike equity securities, where there is only one form of equity per issuer and the securities are homogenous and can be traded as the same instrument, many different types of bonds can be issued by each issuer, which can vary by amount, maturity, coupon, structure, and features. And because a single issuer can issue many different types of bonds, one bond issue is not fungible with the other, or cannot be traded as the same instrument. Moreover, the size of issuance of each type of bond tends to be relatively small (unlike, for example, some benchmark government bonds), further contributing to market fragmentation. All these elements are not conducive to trading, resulting in the low overall liquidity of these products.

NG bonds are also considered to be more suitable for institutional rather than retail investors. NG bonds tend to have higher complexity and risk, in part because of their relatively illiquid nature and more limited exit opportunities. Institutional investors, who have greater resources, sophistication, and know-how, are more capable of analyzing and taking on these kinds of riskier investments. Also, because institutional investors are able to maintain large portfolios, they can find it much more profitable to purchase different types of bond instruments and achieve proper diversification between their relatively illiquid and more liquid assets.

The buy-and-hold nature of institutional investors, such as pension funds and insurance companies, in turn reinforces the low liquidity of NG bonds.

Given these differences in the universe of issuers and investors, regulatory frameworks that provide sufficient flexibility have a better chance of attracting issuers than those with more limited choices. This is particularly relevant in EMCs whose financial systems tend to be bank

⁵ In many EMCs, institutional investors struggle with low (or lack of) supply of securities outside of the government sector, and as a result, their portfolios tend to be highly concentrated in government paper, limiting their ability to achieve proper risk-return diversification.

dominated and where inefficient regulatory processes for bond issuance create a nonlevel playing field in terms of costs and incentives compared with available banking sector alternatives. Developed countries and many advanced EMCs have embraced this notion of flexibility and have introduced a menu of options into their primary market regulatory framework, ranging from public offers to private placements, and a myriad of hybrid alternatives in between. Moreover, within each broad issuance category, there can be additional options—for example, within the public offer framework, shelf-registrations or program issuances for companies interested in issuing multiple tranches over time or fast track approvals for seasoned issuers; or within the private or hybrid alternatives, differentiated disclosure requirements depending on the size of the issuer or issuance, minimum purchase amount, or type or number of investors. The goal is not for a country to have as many options as possible but to provide sufficient alternatives, depending on the size and characteristics of a particular market.

Hybrid alternatives entail reduced issuance requirements and shorter approval times, if any, for offers that meet certain conditions. This paper focuses on a particular type of hybrid alternative, which involves offers targeted to institutional or sophisticated investors—the natural NG bond investors. Henceforth, we refer to this alternative as a *hybrid offer regime* (HBOR).

HBORs differ from traditional or *pure* private placements (as will be explained below) because, while reducing some requirements, they maintain certain protections that are important for institutional investors, such as access to secondary market trading to allow investors to exit their investments with relative ease and antifraud protections against false or misleading information in disclosure documentation; in addition, by maintaining some disclosure and trade reporting requirements (the case in most HBORs), they provide a certain level of transparency about the market. By contrast, pure private placement regimes typically do not provide these protections and, for this reason, are often less attractive to institutional investors, if they are able to invest in them at all.

Thus, by combining and tailoring key elements of the traditional public and private offering frameworks, HBORs strive to maximize securities' appeal for target investors, while minimizing the time and cost of accessing bond financing for issuers. By fine-tuning various requirements, regulators can aim to achieve the ideal balance between these two dimensions, which can help to facilitate increased issuance of corporate bonds. It is, however, essential to ensure that the target investors do have the level of sophistication and know-how to make investment decisions about corporate bond instruments—a key assumption for HBOR. As such, adoption of HBORs is often paired with efforts to strengthen the professionalism of institutional investors.

It is also necessary to keep in mind two important distinctions. First, reduced regulatory requirements do not mean absence of all disclosures. Indeed, as mentioned, most HBORs require limited disclosures and, regardless of regulatory requirements, in practice, issuers do provide

offer information to target investors on a contractual basis, usually following industry standards that are often relatively similar to those defined by public offer regulation.⁶

Second, the move toward lighter regulatory requirements in EMCs for offers targeted at professional investors does not contradict, as it might initially seem, the recent trend in developed markets toward increased regulatory disclosures and transparency in light of the global financial crisis. This trend concerns highly sophisticated instruments, such as structured products (securitization) and over-the-counter (OTC) derivatives (the latter previously unregulated), which were widely regarded to have contributed to the developments that led to the financial crisis, and thus in both cases the main reason for the enhanced requirements has been a financial stability concern.⁷ Adoption of lighter requirements as part of HBORs is related to relatively simple, corporate bond instruments, which tend to be highly overregulated in EMCs due to the fact that many EMCs follow a one-size-fits-all approach and apply regulations designed for public equity markets to all securities instruments.⁸ Importantly, HBOR-type regulations, which already existed in many developed markets, are not being rolled back following the crisis. Rather, they are regarded as key elements of attracting and facilitating corporate bond issuance.

3. Definition of a Hybrid Offer Regime

Important Considerations

It is important to establish that HBORs (also sometimes referred to as professional offer regimes), as described in this paper, do not legally exist under these names in any of the countries that have such regimes. Each country has its own official law and/or regulation, as well as a practical name, for an issuance framework that allows simplified requirements for offers that meet certain conditions, with the most common one being when offers are targeted solely at qualified investors, which is the focus of this note. These issuance channels are typically a variation of either public or private offers, which are usually the two main officially recognized issuance regimes. The names “professional” and “hybrid” are used here solely for conceptual purposes to highlight the distinction between traditional public offer and pure private placement regimes. “Hybrid” effectively conveys that this type of offer includes a mix of public offer and private placement features, whereas “professional” refers to target investors (institutional or high

⁶ There may be greater variations in some countries especially where there is a tendency to provide voluminous amount of information in the public offer prospectus in order to avoid any legal liability for potential nondisclosure of all material information.

⁷ However indeed the enhanced requirements—including disclosure—that are now being required for securitization products would also benefit investors.

⁸ Notably, most countries also allow securitizations to use the HBOR channel, which is similarly important for the development of that segment, and the move to tougher disclosure obligations for these instruments was primarily felt in markets with more liberal HBORs that do not require any disclosures to the regulator, such as in the EU; whereas in countries where some disclosures in lighter form already existed as part of an HBOR, the effect on securitizations was more limited or nonexistent. Though, some countries (e.g., Thailand) have carved out slightly differentiated requirements for securitizations under the HBOR.

net worth) that are typically allowed to invest in securities issued under this framework. Note that definitions of what constitutes a professional or eligible investor can vary across countries and could be expressed in terms of *wealth* (assets, income) or *experience* in securities markets.

Moreover, key elements that are relevant to the HBOR may not all be contained within the same regulation. Thus, the combination of specific conditions stipulated in various laws and regulations that satisfy the hybrid offer definition explained below is what constitutes a country's HBOR for the purposes of this study. For simplicity we collectively refer to these conditions as a "regime" even though the countries' legal frameworks may not define them as such.

Within the HBOR, in the context of analyzing specific requirements and available protections, our focus is specifically on nonpublic or first-time issuers utilizing this offering channel, for whom having lighter regulatory requirements may make a large difference in deciding to tap the bond markets. Contrary to this, publicly registered companies (that have already issued bonds or equity through a public offering) do not present such a clear case in this respect, because they are already complying with costs and regulatory requirements associated with traditional public offers and have developed some degree of savviness to navigate the demands of that issuance channel.

Finally, although in some countries these regimes may be available for both debt and equity securities, this paper focuses on relevant aspects of HBORs as they apply only to debt securities.

Definition

We refer to HBORs as issuance frameworks that draw certain elements from both public and private regimes. Although a great deal of variation is seen across such issuance channels in terms of specific conditions and requirements, we define a regime as an HBOR if it has the following two attributes: (1) exemption from submission of a *full* prospectus and (2) relatively easy access to secondary market trading, albeit subject to certain investor eligibility conditions. Table 1 outlines key characteristics of HBORs as compared with pure public and pure private regimes.

Investment under the HBOR is typically restricted to qualified investors, which can include either only institutional investors or both institutional and high-net-worth investors, who are deemed to have the sufficient resources and/or level of sophistication about securities markets. By contrast, the pure private regime typically restricts the *number* of investors (e.g., less than 50) rather than the type.⁹ The pure public regime has no investor restrictions.

⁹ However, sometimes the restriction could be in terms of just the type of investor or both the number and the type.

Table 1: Comparison of Private, Public, and Hybrid Offer Regimes

Characteristic	Issuance Regimes		
	Pure Private	Pure Public	Hybrid
Eligible investors	Typically restricted in number Sometimes restricted according to level of professionalism	No restrictions Open to institutional, professional and retail investors	Typically restricted according to level of professionalism Often only institutional investors are eligible Sometimes also restricted in number
Offer documentation to the regulator/SRO	Typically none ^b	Submission of a full prospectus	Exemption from submission of a full prospectus Sometimes simplified or short-form prospectus or a basic information notice is required ^c
Regulatory approval	None	Required Timing of approval varies but requires thorough review by the regulator	Typically none If required, typically automatic or only a few days
Secondary market trading	Highly restricted If any, OTC	Unrestricted Exchange and OTC	Typically restricted to qualified investors, but freely tradable among this group of investors Usually OTC
Continuous disclosure requirements	None	Full requirements	Typically simplified requirements
Antifraud provisions^a	Typically none	Apply	Typically apply

Note: OTC = over the counter; SRO = self-regulatory organization.

a. Antifraud provisions refer to responsibilities of issuers and intermediaries, enforced by the regulator or private parties, to present accurate and truthful information during the offering process and in offering documents so as not to mislead investors.

b. Although issuers of pure private placements are typically not required to file anything with the securities regulator, they usually provide offer documentation to target investors. The content of such documentation is based on market practice and is typically agreed upon between the issuer and its investors rather than mandated by the regulator.

c. Similar to pure private placements, regardless of the amount of information submitted to the regulator, hybrid offer issuers usually submit more extensive information to investors, as agreed between the issuer and investor on a contractual basis.

In terms of initial disclosure requirements submitted to the regulator or a self-regulatory organization (SRO), some HBORs have done away with all disclosure obligations submitted to the regulator or SRO and eliminated regulatory approvals—an approach closer to the private placement regime. Others may include submission of a simplified offer document or information notice to the regulator, which either does not require any approval or is essentially granted an automatic approval. And still others require submission of some documentation and regulatory approval, often only if the issuer decides to list the bond on the exchange, but the process is significantly streamlined and has certainty in terms of the approval time frame. In comparison, the pure private regime typically does not require any documentation to be submitted to the regulator; in rare cases, a basic information notice may be required, although not for approval but for purposes of simply filing information with the regulator. The pure public regime requires submission of a full prospectus along with a thorough review and approval by the regulator. Importantly, regardless of regulatory requirements, issuers under both hybrid and private placement regimes provide offer documentation directly to target investors based on prevailing market practice and specific demands of relevant investors.

Another key feature of HBORs is easy access to secondary market trading, as mentioned above. Although trading is usually restricted among the same class of investors that was eligible for the initial purchase of securities—that is, institutional or high-net-worth investors—within this investor segment, securities are freely tradable. By contrast, pure private regimes have very limited and highly restricted trading provisions (although, in some emerging markets, these restrictions are poorly enforced), such as transfer restrictions or complicated clearing and settlement processes, whereas pure public regimes allow unrestricted trading. Trading is typically conducted OTC for hybrid and pure private regimes and OTC or on-exchange for pure public regimes.

Issuers of hybrid offers typically need to comply with simplified continuous disclosure requirements, although some HBORs do not impose any ongoing information requirements. For many HBORs, if offers are listed on the exchange, compliance with full requirements may be necessary similar to issuers of pure public offers. Pure private placements usually do not require any continuous disclosure.

Finally, HBORs, like pure public regimes, typically maintain antifraud provisions related to false or misleading statements (whether intentional or negligent) made in offering documents or during the offering process (e.g., U.S. SEC Rule 10b-5). In some countries provisions that make issuers and intermediaries accountable for the accuracy and truthfulness of information provided in offering materials are enforceable by the securities regulators. The existence of these provisions, especially in cases in which their enforcement is entrusted to the securities regulators, provides important protections and is particularly valuable for investors, including institutional ones, such as pension and mutual funds, that have fiduciary duties with their end investors and are highly cautious about investing in instruments that do not provide some degree of protections. They are especially valuable in countries where the judicial system is inefficient and enforcement of contracts is difficult, provided that the antifraud provision grants full powers to the regulator, including ability to arbitrate and sanction without having to always rely on general

courts. Pure private regimes usually do not provide such protections, with investors having to rely on local courts to seek compensation for grievances.

To summarize, *pure public offer* represents an issuance regime with the widest distribution and greatest investor protections, but its initial and ongoing requirements can be onerous and costly for issuers, discouraging the use of bond financing, especially for smaller, less established issuers. The *pure private placement* regime offers the smallest distribution and the least amount of investor protections. Although it grants issuers the quickest access to bond financing, its lack of transparency and restricted trading reduce its investor appeal. The *hybrid offer* regime aims to minimize the regulatory burden and cost of accessing the bond market while maintaining a degree of investor protections and secondary market trading to maximize its attractiveness for target investors.

4. Hybrid Offer Regimes—Select Country Practices

In this section, we highlight key characteristics of HBORs of the selected countries reviewed in this study. (See appendix 2 for more detailed analysis by country.)

The analysis is presented along seven different elements: (1) existence, nature, and time of adoption; (2) key conditions and eligibility criteria; (3) requirements for submission and approval of documentation; (4) listing; (5) conditions for secondary market trading; (6) continuous disclosure requirements; and (7) antifraud provisions.

4.1 Existence, nature, and time of adoption

Table 2: Year of Adoption and Nature of Hybrid Offer Regimes

	United States	EU	Brazil	Chile	India	Israel	Malaysia	Thailand
Year of adoption	1990	2003	2009	2001	2008	2005	2007	2009
Nature of regime	Private placement with secondary market trading	Exempt public offer	Exempt public offer	Exempt public offer	Listed private placement	Private placement with secondary market trading	Private placement with secondary market trading	Private placement with secondary market trading

As seen in Table 2, all the countries reviewed have an alternative offer regime that meets the main characteristics of an HBOR as defined in section 3. All the regulations except for that of the United States are fairly recent. We have identified three types of HBORs: private placement with

secondary market trading, exempt public offer, and listed private placement.¹⁰ Israel, Malaysia, Thailand, and the United States refer to their hybrid offers, whether officially or in practice, as private placements, whereby a hybrid offer clearly constitutes a *nonpublic* offering.¹¹ In Brazil, Chile, and the EU, although hybrid issues are exempt from filing a full prospectus, they are still considered *public* offers. Finally, India has a unique HBOR of listed private placements, whereby privately issued bonds are listed on an exchange to increase their transparency and appeal for institutional investors (see section 4.4, “Listing”).

4.2 Key conditions and eligibility criteria

As seen in Table 3, the majority of the countries (six out of eight) define the main condition for the alternative offer regime as the type of investor that can purchase the offer. Broadly speaking, all of these countries require that the offer be made to qualified investors, whose definition varies across countries—that is, some are stricter, including only institutions, whereas others also include high-net-worth individuals (HNWIs; see, for example, the definition for accredited investor in the United States in box 2). The EU includes the condition of qualified investors in addition to four other possible conditions that can qualify an offer for the same exemption,¹² including an offer made to fewer than 150 investors and an offer with a €100,000 minimum denomination per unit.¹³ The latter, which effectively translates into keeping retail investors from purchasing exempt issues, is the easiest to control and most commonly used because it takes the guesswork out of the process since the condition is hard-wired into the security itself.

Similar to the EU, India also has a combination of conditions, namely maximum number of investors in addition to qualified institutional buyers (QIBs), and Brazil combines both the number and type into a single condition: hybrid offers can be purchased by a maximum of 50 QIBs.¹⁴

¹⁰ The *private* versus *exempt public* designation is based on how these regimes are treated within the countries’ legal and regulatory frameworks and how they are commonly referenced. For the purposes of categorization in Table 2, the term “private placement” is used for private or nonpublic offerings, although not all countries in this category may use the term *placement* (e.g., in Malaysia, *private debt securities* is used).

¹¹ In the United States, following the enactment of the Jumpstart Our Business Startups (JOBS) Act in April 2012 and subsequent rule making by the SEC, which went into effect in September 2013, private placements are no longer prohibited from general solicitation and advertising, making them less *private* in that regard. However, ultimate purchasers must still be accredited investors, which maintains their classification as nonpublic offers.

¹² Although other countries may also include other types of alternative offer regimes that are based on different conditions other than the type of eligible investor (e.g., size of the offering, minimum purchase amount), specific exemptions and requirements applicable to those alternative regimes usually differ from those applicable to regimes based on the type of investor, whereas in the case of the EU, all five conditions fall under the same exemptions/requirements.

¹³ The minimum denomination and the maximum investor threshold were increased in July 2012 from €50,000 and 100, respectively. The other two conditions are: (1) offer addressed to investors who acquire securities for a total consideration of at least €100,000 (previously €50,000) per investor, for each separate offer, and (2) offer with a total consideration of less than €150,000 (previously €100,000) calculated over a period of 12 months.

¹⁴ The number of QIBs that can purchase hybrid offer securities during primary issuance was recently increased from 20 to 50 as part of the amendments introduced to Instruction 476 (Brazil’s HBOR) in September 2014.

Table 3: Key Conditions for Hybrid Offer Regimes

	United States	EU	Brazil	Chile	India	Israel	Malaysia	Thailand
Key conditions for initial offering	Initial purchaser who acts in the capacity of an underwriter, typically an accredited investor, with the intention to sell to QIBs ^a	5 possible conditions, including qualified investors	Max. 50 QIBs	Qualified investors	Max. 200 investors, excluding QIBs. For financial institution issuers – max. 49 investors in total	Qualified investors	AIs, HNWEs and HNWI	AIs, which include HNW and institutional investors

Note: AI = accredited investor; HNW = high net worth; HNWE = high-net-worth entity; HNWI = high net worth individual; QIB = qualified institutional buyer.

a. In the United States, the HBOR is constituted by the combination of the pure private placement regime (Regulation D or Section 4(a)(2) of the 1933 Act) and the resale of private securities (Rule 144A). Thus, the key conditions for the HBOR are derived based on offers that are ultimately targeting the 144A treatment, or are intended to be sold to QIBs. The private placement regime on its own stipulates that securities can be sold to an unlimited number of accredited and up to 35 sophisticated investors. Thus, offers targeting the 144A treatment are initially purchased by an underwriter, typically an accredited investor, with the intention of distributing the securities to QIBs. The QIB definition is stricter than that of accredited investors.

Box 2. Accredited Investor definition in the US*

1. A bank, insurance company, registered investment company, business development company, or small business investment company;
2. An employee benefit plan, if a bank, insurance company, or registered investment adviser makes the investment decisions, or if the plan has total assets in excess of \$5 million;
3. A charitable organization, corporation, or partnership with assets exceeding \$5 million;
4. A director, executive officer, or general partner of the company selling the securities;
5. A business in which all the equity owners are accredited investors;
6. A natural person who has individual or joint net worth together with a spouse that exceeds \$1 million excluding primary residence;
7. A natural person with income exceeding \$200,000 or joint income with a spouse exceeding \$300,000 in each of the two most recent years; or
8. A trust with assets in excess of \$5 million, not formed to acquire the securities offered whose purchases a sophisticated person makes.

*This is an abridged definition available on the US SEC website and further modified by the author. A full definition is available on the Electronic Code for Federal Regulations (e-CFR) website.

4.3 Requirements for submission and approval of documentation

As seen in Table 4, all countries exempt HBOR issuers from filing a *full* prospectus with the regulator and/or exchange. However, most countries require submission of some kind of notification or basic information about the issuance either to the regulator or the exchange, with the exception of the EU and the United States.¹⁵ For example, Chile and Thailand require submission of a simplified prospectus to the regulator. Malaysia requires issuers to submit to the regulator Principal Terms and Conditions and an Information Memorandum (IM) or Disclosure Document (DD) if the issuer chooses to prepare an IM/DD. In India, simplified disclosures need to be submitted to the relevant exchange. In Brazil, issuers are required to submit to the regulator an offer commencement announcement within five business days from the first investor roadshow and a conclusion announcement, including the results of the sale, within five days following the sale.¹⁶

Six of the eight HBOR countries do not require regulatory approval of the submitted documents. In the remaining two countries, maximum approval time frame is 14 business days in Malaysia and one business day in Thailand. Notably, the time frame for approval is shorter in Thailand but is the same in Malaysia when compared with that for public offers. In India, the offer document needs to be submitted to the relevant exchange and uploaded on the exchange's website for public comments for at least seven days before listing. It is the responsibility of the issuer's intermediary (merchant banker) to ensure that all comments are addressed before listing takes place. But notably, the exchange does not provide any approval or final authorization for listing.

The purpose of filing some kind of notification serves to inform the regulator about the size of issuance coming through the HBOR channel, which can be important for monitoring and financial stability purposes. In countries where relatively more extensive documentation is required coupled with some type of approval process, it could be assumed that the regulator or SRO is checking for other elements of the issuance as well (e.g., completeness and relevance of information included based on the issuer's sector or type of instrument being issued and its acceptability), although the level of review is expected to be lighter compared with that for traditional public offers.

¹⁵ Except for issuers relying on Regulation D, for which submission of a short information document is required.

¹⁶ The requirement to file an offer commencement announcement was only recently introduced as part of the September 2014 amendments to Instruction 476.

Table 4: Submission and Approval of Documents for Hybrid Offer Regimes

	United States	EU	Brazil	Chile	India	Israel	Malaysia	Thailand
Full prospectus approval by regulator/ SRO	No	No	No	No	No	No	No	No
Submission of any kind of offer document to regulator/ SRO	No ^a	No ^b	Yes	Yes	Yes	Yes	Yes	Yes
Type of document to be submitted	N/A	N/A	Offer commencement and conclusion announcements should be filed with regulator	Simplified prospectus and ads have to be submitted to regulator	Simplified disclosures have to be filed with exchange	Description of the securities and trust deed need to be submitted to the exchange	Principal Terms and Conditions and IM or DD, if issued	Registration statement and short-form prospectus
Timing of submission	N/A	N/A	Within 5 days after the sale	At least 2 days before the first sale	At least 7 days before the listing.	Prior to listing securities on TACT Institutional	Prior to issuance	At least 1 day before the first sale
Approval required by regulator/ SRO	No	No	No	No	No	No	Yes	Yes
Max. time frame for approval	N/A	N/A	N/A	N/A	N/A	N/A	14 business days	1 day

Note: DD = Disclosure Document; IM = Information Memorandum; TACT Institutional: Tel-Aviv Continuous Trading Institutional, which is a standalone trading system within the exchange.

a. Unless the offer is made in reliance on Regulation D, which requires submission of a short notice.

b. Unless a security is listed on a regulated market, which constitutes a major EU exchange. Other alternative markets, referred to as “exchanged-regulated markets,” do not trigger prospectus obligations, although may require some type of simplified disclosure information.

4.4 Listing

In most of the countries reviewed, listing of securities issued via an HBOR is allowed but often requires the company to comply with the same disclosure obligations as required for public offers (Table 5). In such cases, a company willing to list its hybrid offer would only be delaying compliance with full prospectus disclosures, assuming it decides to list sometime after the primary offering. Yet, this approach may still be advantageous, because it would allow the company to raise capital relatively quickly (i.e., with limited or no regulatory approval) and take advantage of favorable market conditions; later, if the goal is to make the issue more widely accessible to investors, it can comply with full public offer requirements and list the security on the exchange.

Table 5: Listing of Hybrid Offer Securities

	United States	EU	Brazil	Chile	India	Israel	Malaysia	Thailand
Are HBOR securities commonly listed on the exchange? If not, are they allowed to be listed?	No, but allowed after offering	Yes, usually	No, listing is not allowed unless the issuer is a registered public company	No, but allowed	Yes	No, but allowed	No, but allowed	No, but allowed
Additional initial disclosure requirements for listing	Yes, same as for public offers	Yes, but lighter than public offers if the unit denomination is $\geq$ €100,000	N/A	No	Yes, lighter than public offers	Yes, lighter than public offers	No	Yes, same as for public offers

Notable exceptions to the above practice are the EU, India, and Israel, where HBOR issuers can list bonds and still benefit from somewhat lighter disclosure requirements, under certain conditions, and faster approval time compared with those for pure public offers, and Chile and Malaysia, where listing triggers no additional disclosure obligations. For example, in India, as mentioned above, exchange listing is a key element of the HBOR, which otherwise would be more akin to a pure private placement regime. India introduced listed private placements in 2008 as an effort to increase transparency and investor appeal for privately issued bonds that traditionally represented a rather opaque market. The measure was widely embraced by the market, with listed private placements representing about 85 percent of total corporate bond issuance in 2010.

In the EU, exchange listing is also prevalent mainly to make the offer eligible for investment by certain institutional investors, whose investment guidelines allow only limited investments in

securities that are not listed on an exchange.¹⁷ Interestingly, independent of a security's offering method, all corporate bonds with a minimum unit denomination of €100,000 are subject to lighter disclosure requirements, consistent with the notion that a larger denomination translates into institutional investor rather than retail participation in the trading of a security.

Another peculiarity of the EU case is that listing on a regulated market does not automatically mean that a security that was initially offered on an exempt basis is available for trading by the broader investing public. This is because resales of the security remain in the exempt status, even once listed, so long as they continue to satisfy one of the five exemption conditions (see section 4.5). If a resale fails to do so, the seller would need to have an up to date regulator-approved full (i.e., nonexempt) prospectus. If this is indeed the case, the security can be sold to retail investors for the period during which the prospectus continues to be valid and kept up to date. Because there are no built-in automated ex-ante safeguards to ensure compliance with this requirement, it is the responsibility of institutional investors and intermediaries to act as gatekeepers and prevent leakage to retail investors without an approved updated prospectus in place. In practice, the majority of debt securities initially offered to institutional investors are high denomination (i.e., ≥ €100,000) and remain in institutional hands regardless of the listing status.

4.5 Conditions for Secondary Market Trading

As seen in Table 6, most countries reviewed require that securities offered via the HBOR meet the same conditions for trading as they did for initial placement. Trading here does not refer to conducting transactions via a trading platform but simply being able to easily sell securities to a third party.

For six of the eight countries, trading of hybrid offer securities must take place solely among qualified investors. In the EU, the same five exemptions apply as for initial issuance, including resales to qualified investors and maintaining a minimum denomination of €100,000. India does not specify any regulations for OTC trading, but requires trades conducted on the exchange to be done in minimum lot sizes of Rs 10 million (approximately USD 160,000); the latter has to be done within the institutional platform of a dedicated debt segment of the exchange. These institutional exchange platforms have attracted a significant share of trading since their recent launch,¹⁸ effectively ensuring that hybrid offer securities are traded only among institutional investors. Like in India, HBOR securities in Israel are also traded in a specialized platform limited to qualified investors—TACT Institutional—which is housed within the exchange, though, not subject to exchange's listing requirements.

¹⁷ Notably, listing on exchange-regulated markets, which fall outside of the EU Prospectus and Transparency Directives and have lighter disclosure requirements, can, in many cases, satisfy the listing condition required by institutional investors.

¹⁸ The first dedicated debt segment was launched by the National Stock Exchange in May 2013. The debt segment has two platforms: retail and institutional. Privately placed corporate bonds must be listed on the institutional platform.

Table 6: Conditions for Trading Hybrid Offer Securities

	United States	EU	Brazil	Chile	India	Israel	Malaysia	Thailand
Conditions for trading	Can only be traded among QIBs. After a 1 year holding period, can be traded among any investors. ^a	Same as initial exemption conditions, including qualified investors	Can only be traded among QIBs after 90 day holding period	Can only be traded among qualified investors	Min. lot size of INR 10 million in the dedicated institutional debt platform of the exchange. None in the OTC market	Can only be traded among qualified investors on TACT Institutional	Can only be traded among AI, HNWE and HNWI	Can only be traded among HNW and institutional investors

Note: HNW = high net worth; HNWE = high-net-worth entity; HNWI = high-net-worth individual; OTC = over the counter; QIB = qualified institutional buyers; TACT Institutional, which is a standalone trading system within the exchange.

a. Although, in practice, most remain in QIB hands for life.

In the United States, trading can immediately take place among QIBs¹⁹ but could be opened to any investors after a one-year holding period (six months for an existing issuer, e.g., a reporting company). In practice, however, most HBOR securities remain in QIB status for life, because lifting the trading restriction requires the issuer's counsel to provide a legal opinion indicating that the holding period has been satisfied.²⁰ This extra effort, coupled with the fact that the debt market in the United States is largely institutional, makes conversion of these securities for retail trading a relatively rare occurrence.

4.6 Continuous Disclosure Requirements

As seen in Table 7, the application of continuous disclosure obligations to HBORs varies across countries. They do not apply in the EU, Israel, and the United States.²¹ Four of the remaining countries (Brazil, India, Malaysia, and Thailand) impose ongoing disclosure obligations but in lighter form, whereas Chile has the same requirements as for public offers. In all countries except India, if an HBOR security is listed, regular public offer continuous disclosure obligations

¹⁹ See appendix 1 for the definition of QIB in the United States.

²⁰ Determining whether the holding period has been met is not always straightforward because the holding period stops running on securities owned by affiliates, and, thus, it is necessary to determine whether the securities in question were at some point owned by an affiliate. An affiliate is a person, such as an executive officer, director, or large shareholder, in a relationship of control with the issuer. Control means the power to direct the management and policies of the company in question, whether through the ownership of voting securities, by contract, or otherwise.

²¹ However, holders or prospective purchasers of hybrid offer securities in the United States (i.e., issued via Regulation D or resales under Rule 144A) have the right to obtain from the issuer (1) a brief description of the issuer's business, products, and services; (2) the issuer's most recent balance sheet, profit and loss statement, and retained earnings statement; and (3) similar financial statements for the two preceding fiscal years.

would apply. In India, because the HBOR already constitutes a listed status, no separate requirements are in place. And in the case of the EU, as mentioned above, debt securities with a denomination of at least €100,000 are subject to lighter information requirements, both initial and ongoing.

In all cases, if a company issuing under the HBOR has other securities issued via the pure public offer channel, then it would be subject to full ongoing reporting obligations because of its existing “registered” or “reporting” status.

Table 7: Continuous Disclosure Obligations for Hybrid Offer Securities

	United States	EU	Brazil	Chile	India	Israel	Malaysia	Thailand
Continuous disclosure	No	No, unless listed on a regulated market	Yes, but lighter	Yes, similar to public offers	Yes, but lighter	No	Yes, but lighter	Yes, but lighter

4.7 Antifraud Provisions

As seen in Table 8, all the HBOR countries enforce antifraud regulations related to information presented by issuers and intermediaries on hybrid offers, which includes both intentional as well as negligent omissions or false or misleading statements. However, liability provisions may differ somewhat for hybrid offers versus pure public offers (e.g., in the United States).

What is important, however, is the role of the regulator in enforcing these antifraud provisions, namely, whether the regulator can directly sanction or seek sanctions for violators or whether the regulations simply allow a potential victim of fraud to seek compensation. A more in-depth study of countries’ antifraud provisions is needed to answer this question, and the answer may not be straightforward, given many particularities of each country’s antifraud frameworks. An initial closer look at select countries’ antifraud provisions and practices is provided in appendix 3.

Table 8: Application of Antifraud Provisions to Hybrid Offer Regimes

	United States	EU	Brazil	Chile	India	Israel	Malaysia	Thailand
Are HBOR securities subject to antifraud provisions?	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes

5. Relative Importance and Impact of Hybrid Offer Regimes in Select Countries

Figure 1 shows the relative importance of the hybrid issuance channel as a proportion of total value of issuance. In general, data on nonpublic offerings—private placements and HBORs—are not easily available, particularly in the more developed markets of the EU and the United States, which do not require registration with regulators, making these issuances more difficult to track. With regard to EMCs, data on HBOR issues was available from securities regulators, who are keener and more able to monitor these issues, given the relative novelty of the regimes in their countries and because regulators tend to be more involved in the HBOR issuance process than those in the EU and the United States.

Among the EMCs, the HBOR carries the most importance in Malaysia, India, Brazil, and Thailand, accounting for 99, 85, 69, and 43 percent of total issuance value in 2010, respectively. HBOR's share of issuance in Brazil and Thailand has since gone up to 87 and 85 percent in 2013, respectively.²² The United States and the EU HBORs also account for a sizeable portion of total issuance: 28 percent²³ and 65 percent,²⁴ respectively.

Interestingly, Chile has had only a single issuance under the HBOR since its introduction in 2001. Based on consultations with the Chilean securities regulator, this could be for two possible reasons: (1) it has not introduced matching flexibilities in investment regulations for institutional investors, and (2) issuers and intermediaries have an inertial preference to continue preparing full prospectus disclosures. For example, although the HBOR eliminated the credit rating requirement, major institutional investors, such as pension funds, are still required by regulation to invest only in securities with a credit rating. Nevertheless, Chile is included in the above analysis, because it serves as an important example, highlighting the need for appropriate regulatory amendments to take place on the investment side to enable issuers to take advantage of benefits provided by the HBOR.

²² The figure for Thailand is as of Q3 of 2013.

²³ Figure derived from Thomson Financial (Thomson One Banker-Deals Module), SIFMA, and World Bank calculations.

²⁴ Comprehensive issuance data by offer type (public vs. exempt) within the EU region is not currently available. As an attempt to determine a best estimate, a representative proxy was used based on Eurobond offers with a minimum unit denomination of €50,000 that were listed in 2010 on the Luxembourg Stock Exchange (LuxSE), one of the largest Eurobond listing venues in Europe. Thus, the data try to capture offers taking advantage of prospectus exemptions based on the minimum denomination condition, i.e., offers with a denomination of €50,000 or greater, which was the regulatory threshold in 2010 (the threshold was increased to €100,000 in 2012). The data include only euro-denominated offers. The main caveats of the analysis are that the data do not take into account: offers in other currencies, exempt offers based on conditions other than the minimum denomination, and offers made on a national basis outside the Eurobond markets. Data derived from Luxembourg Stock Exchange, International Capital Market Association (ICMA) consultations, and World Bank calculations.

Figure 1. Relative Importance of the Hybrid Offer Regime
Percentage of total issuance value, 2010

Sources: Respective country jurisdictions except for the United States and the EU. United States: Thomson Financial (Thomson One Banker-Deals Module), SIFMA, and World Bank calculations. EU: Luxembourg Stock Exchange, International Capital Market Association (ICMA) consultations, and World Bank calculations.

a. Estimate based on a proxy of offers with a minimum unit denomination of €50,000, one of the most commonly used conditions for hybrid offer exemption in 2010. This threshold was increased to €100,000 in July 2012.

Below we review select country cases in more detail to see if the introduction of the HBOR has had any observable impact on the issuance of corporate bonds. Relevant data were available for only three countries: Brazil, Thailand, and the United States.

It is important to note that conclusions made below are not definitive, given that corporate issuance is influenced by many factors (e.g., level of interest rates, liquidity in the banking sector, or financial crises), for which sufficient data and econometric analysis would be needed; nevertheless, the trends highlighted here provide interesting insights and suggest that the introduction of HBORs likely had a positive impact in increasing the number and/or diversifying the type of issuers coming to the bond market.

5.1 The United States

As shown in Figure 2, issuance through the HBOR (Rule 144A) was on average around 21 percent over the last 15 years; it has reached as high as 28% in 2010.

Figure 2. Corporate Debt Issuance in the United States
dollars, billions

Sources: Thomson Financial (Thomson One Banker-Deals Module), SIFMA, and World Bank calculations.

Figure 3. Investment-Grade and High-Yield Issuance in the United States
dollars, billions

Sources: Thomson Financial (Thomson One Banker-Deals Module), SIFMA, and World Bank calculations.

Notably, when analyzing the issuance by market segment, the HBOR has seen most usage from high yield corporate bond issuers, with, on average, 72 percent of high-yield issuance occurring under the HBOR (Rule 144A) over the last 15 years (Figure 3B). This attests to the regime's particular appeal for less established, lower credit quality, and riskier issuers that do not find

value in going through the public offer regime requirements, given their natural focus on institutional as opposed to retail investors.

5.2 Brazil

In Brazil, where the hybrid offer regime was relatively recently introduced (2009), an increasing trend has been seen in hybrid offer issuance, which began at 48 percent of total issuance *value* in 2009 and increased to 94 percent at the end of 2014. Instruments included are debentures, promissory notes, CRIs,²⁵ which are certificates of real estate receivables similar to mortgage backed securities, FIDCs,²⁶ which are credit receivables investment funds – a type of securitization instrument, and letras financeiras (LFs), which are debt instruments that can be issued by financial institutions (see Figure 4A).²⁷

Although it is still too early to judge, initial years show that the introduction of the HBOR might have led to growth in the overall value of corporate bond issuance in absolute terms, as well as an increase in the number of issuers (Figure 4C). A change also seems to have occurred in the composition of issuers coming to the bond market: Namely, the market has seen a significant increase in *first-time issuers*, companies that have never previously issued any type of security. The number of first-time issuers increased from 27 during the three-year period before the introduction of the HBOR (2006–2008) to 251 during the three years after the introduction of the HBOR (2009–2012).²⁸ Out of these 251 first-time issuers, the majority (94 percent) issued through the new hybrid offer regime (Figures 5A and 5B). Moreover, although the years before the introduction of the HBOR saw large debenture issuances from leasing companies, which are controlled by financial institutions, the years after the launch of the HBOR show a much greater participation of companies from the real sector.²⁹ All of this suggests that the HBOR may have helped to attract a more diverse set of companies to the bond market that had never considered using this funding source before.

²⁵ Certificados de recebíveis imobiliários

²⁶ Fundos de investimento em direitos creditórios

²⁷ Financial institutions are not allowed to issue debentures. They can issue only letras financeiras.

²⁸ We were able to obtain figures only through the first quarter of 2012 because the securities regulator in Brazil discontinued tracking this information.

²⁹ There were leasing issuances in 2011, 2012, and 2013, but they accounted for a much smaller proportion of total issuance than in earlier years.

Figure 4. Value of Issuance, Average Issue Size, and Number of Issuers in Non-Government Bonds in Brazil

At the same time, the total *number of issuances* increased from 217 in 2006 to 632 in 2014, of which 95 percent came through the HBOR. As a result, there was a drop in the *average issuance size* after the introduction of the HBOR, especially pronounced in debentures, which decreased from 1,478 million reais in 2006 to 304 million reais in 2014 (Figure 4B). This, coupled with the rise in first-time issuers, could also suggest that the HBOR may have appealed to companies looking to raise smaller amounts in the bond market that are less seasoned in dealing with pure public offer regime requirements, thus possibly helping to diversify the issuer base beyond the more established blue chip-type firms. It could also suggest that because of the simplifications provided by the HBOR, companies are encouraged to issue smaller amounts on a more frequent basis. All of this should be considered with the caveats mentioned above.

Figure 5. Increase in the Number of Issuers and Number of First-Time Issuers in Non-Government Bonds in Brazil

Sources: Brazil CVM, Boletim Anbima January 2012, and World Bank calculations.

5.3 Thailand

Thailand serves as an interesting case, because the market effectively uses all three issuance channels that are available: pure public offer (PO), pure private placement (PP), and HBOR (for accredited investors [AIs]). After the introduction of the latter in 2006, some of the PO and PP issuance seems to have migrated to the HBOR, but this shift was not as dramatic as was seen in the case of Brazil. In the third quarter of 2013, the HBOR accounted for about 85 percent of total issuance value compared with 12 percent represented by the PO and 3 percent by the PP (Figure 6A), although in 2012, the issuance was much more evenly split: 32 percent (HBOR), 39 percent (PP), and 29 percent (PO). On average, HBOR accounted for 43 percent of issuance value over the last seven years since its introduction. Also, similar to Brazil, the market saw an increase in the issuance value in absolute terms.

The overall *number of issuers* increased from an average of 54 during the five years prior to 2007 (the first year issuance was recorded under the HBOR) to an average of 157 after the introduction of the HBOR (2007–2013); a noticeable dip was observed in 2008, likely because of the 2008 financial crisis. Seventy-two percent of the issuers used the HBOR in 2013, which is the highest since HBOR's introduction (Figure 6B).

The *number of issuances* also increased significantly since the introduction of the HBOR from an average of 99 during the five years prior to 2007 to an average of 2,644³⁰ after the introduction of the HBOR (2007–2013); again, there was a significant dip in 2008, likely because of the

³⁰ The significant increase in the number of issuances is also a result of the change in the Thai SEC's methodology to collect and calculate issuance data starting in 2009. Previously a program issuance was counted as one issuance; after the change was implemented, each issuance under the program was counted individually, resulting in many more overall issuances.

crisis. The hybrid regime represented a significant share of the number of issuances, especially in the last three years (92 percent in 2013) (Figure 6C).

Figure 6. Value of Issuance, Number of Issuers, and Number of Issuance by Regime in Thailand

Figure 7. Average Issuance Size, Total and by Offering Regime in Thailand
baht, millions

Finally, the *average issuance size* when looking at all regimes together has markedly decreased starting in 2009, with a similar trend being observed for the HBOR regime taken on its own (Figures 7A and 7B); the unusual spike in 2008 is likely due to a significant drop in the number of issuances. This, coupled with a rise in the number of issuances and issuers, could suggest that, on average, companies are issuing more frequently and in smaller amounts, with the majority using the HBOR channel.

6. Lessons and Recommendations

The HBOR cases analyzed in this note serve as interesting examples that can provide important lessons for countries still exploring the idea of introducing an HBOR-type issuance framework. No one case represents the “right” approach and several of the regimes, including those in the developed markets, have inherent challenges that other countries can learn from. Below we outline some views and recommendations related to certain key aspects of these regimes, drawing from the experiences analyzed.

6.1 Notification to the regulator

Although we saw that some jurisdictions such as the EU and the United States do not require any submission of information to the regulator, in our view, maintaining some kind of basic notification requirement is important for two reasons:

- (i) It gives the regulator knowledge about the extent of new issuance taking place in the country, which is important for understanding the size of the overall market under this issuance channel, so that the regulator can assess the speed of its growth, market participants, and any potential vulnerabilities that could arise for the financial sector; and
- (ii) By having the knowledge about the market size and participants, the regulator can enhance its supervision program of market intermediaries to ensure their compliance with suitability rules and conduct regulations relevant for HBOR investments, that is, that HBOR securities do not fall into the hands of retail investors. For example, if a regulator notices frequent activity by a particular intermediary, it might decide to include that entity in its upcoming inspection program. In the absence of such knowledge, tailoring the supervisory program might prove more difficult, which in practice might mean that the regulator would be, in essence, outsourcing compliance with HBOR conditions to intermediaries—a potentially risky alternative in less developed markets.

6.2 Requirements in case of listing

In many jurisdictions, listing on the exchange typically means that a security can be purchased in the secondary market by the broader investing public (i.e., including retail investors). As a result,

issuers that are listed are subject to similar initial and ongoing disclosure requirements as those required for a regular public offering.³¹

In this context, and given the wide variety of HBOR frameworks and related listing regimes, it is important to understand what listing really entails when referring to HBOR securities. If access is effectively open to all investors as a result of listing, it is important to ensure that the security is subject to full public offer requirements—whether first reviewed and approved by the regulator or directly reviewed by the exchange (i.e., delegated by the regulator), or both. If access remains restricted to only eligible investors, it is important for the exchanges to match the lighter HBOR requirements provided by the regulator for the initial offering, so as not to create an added burden on issuers that are not seeking a retail distribution. In this case, issuers’ desire to list would likely be related to obtaining a formal listed status to appeal to certain institutional investors (that prefer or are mandated to invest in listed securities) or accessing trading functionalities and possible improved conditions (e.g., transparency, price discovery) of a dedicated trading platform, if such a platform is in place.

In our analysis, we saw that in certain countries these distinctions are very clearly defined (e.g., Israel, Thailand, or the United States), whereas in others there is less clarity (e.g., Chile or Malaysia). Adopting clear regulations along the lines outlined above would ensure that the HBOR regime is effectively serving its intended target investors, minimizing opportunities for these securities to leak to retail investors.

6.3 Trading conditions and holding period

As seen above, most countries restrict trading of HBOR securities among the same category of investors (i.e., institutional or high net worth) that are eligible for the initial purchase. Interestingly, the United States follows this practice initially, allowing an HBOR security to be immediately traded among QIBs, but lifts this requirement after a one-year holding period, at which point the security can become widely traded. Although this seems to counter the central notion of HBORs that are premised on these offers being accessed only by professional investors, in practice, as mentioned in section 4.5, 144A (or HBOR) securities stay “144A for life.” This is mainly for three reasons: (1) Lifting of the trading restriction does not happen automatically but rather requires the issuer’s counsel to provide a legal opinion confirming that the holding period has been satisfied, after which the restricted legend can be removed from the securities; (2) the debt market is largely catering to institutional investors with no need to access the retail segment; and (3) once the restricted status is removed from securities, their identification number changes, and they would no longer be fungible with the same 144A securities that are still in QIB status, which fragments the market and reduces liquidity.³²

³¹ In general, a distinction is made between the authorization of public offering and the authorization for listing of securities. In many countries the former is a decision that corresponds to the regulator subject to requirements embedded in the securities law and corresponding regulations, whereas the latter is usually left to the exchange and is subject to the requirements imposed by the exchange via its listing rules, although such rules are subject to oversight by the regulator (via an approval process).

³² The restricted status is usually removed for a specific set of securities of a bond in question, not the entire outstanding stock of that bond.

Brazil offers a different example of a holding period, whereby it does not allow any trading—even among QIBs—to take place until a 90-day holding period is over. This seems a potentially unnecessary precaution if one is certain that trading can be safely controlled to only eligible QIBs.³³ The main rationale for the holding period, according to the Brazilian regulator, is to ensure that the maximum number of QIBs that can be initial purchasers of a hybrid offer security is not easily circumvented.

As such, to allow issuers to reap full benefits of issuing through an HBOR, including relatively easy access to secondary market trading, as outlined above, it is recommended to allow trading only among qualified investors from the time of initial placement throughout the life of the offer or until an issuer complies with full public offer requirements and decides to make an issue more widely available.

Regarding the option of introducing a specialized trading platform for HBOR securities, the choice depends on a specific country's trading culture and circumstances. For example, Israel has a virtually nonexistent OTC market and a strong exchange trading culture; for this reason, it seemed reasonable to introduce a specialized trading platform only for HBOR securities restricted to QIBs. In other countries where OTC trading of corporate bonds is prevalent, it is likely that market participants would prefer to continue trading HBOR securities OTC; however, India saw a notable shift from OTC trading to dedicated institutional debt platforms since their introduction on authorized exchanges in 2013. To ensure maximum transparency, at least post-trade, it is advisable to require trades in HBOR securities, including those performed OTC, to be reported to a centralized system, such as an exchange or a central securities depository, which can then make the information public. This is practiced in most countries analyzed in the paper.

Finally, any hurdles that may exist in preventing HBOR securities from freely trading—such as legal obstacles to secondary market trading, or clearing and settlement complexities—would need to be alleviated to satisfy the important HBOR characteristic of easy access to secondary market trading.

6.4 Regulator's role in antifraud provisions

As seen in section 4.7, all countries analyzed apply antifraud provisions to HBOR securities; however, as mentioned, an important aspect is whether the regulator has direct power to intervene and enforce these regulations. The weight carried by antifraud provisions and their usefulness in preventing securities fraud is greatly augmented in cases where a regulator has the legal ability and capacity to enforce antifraud regulations, such as by initiating its own investigation, issuing injunctions, or imposing sanctions. This is because in a private party lawsuit, in the absence of a regulator's involvement, only financial compensation is sought and the violator may be required to pay a large sum of money, if found guilty. However, if a regulator is also involved, not only does the violator become financially liable, but it also can be

³³ Interestingly, as part of the recent amendment of Instruction 476 (Brazil's HBOR) in September 2014, which expanded the HBOR to equity securities, the holding period does not apply to equity securities going through the hybrid offer channel. Other important differences also exist in the application of the HBOR to equities, such as the requirement to obtain a company registration with the Comissão de Valores Mobiliários (Brazil's Securities Commission), which is waived for bond issuers going through the HBOR.

subject to an injunction ordering the violator to stop engaging in the fraudulent activity, or, depending on the severity of the violation, the violator could be suspended or forbidden to continue its business. This type of action by the regulator broadcasts to the public that a certain market participant has committed a violation and sends a message that all future violators will be punished.

Thus, it is recommended that securities issuances, especially public and hybrid offers, be subject to antifraud provisions, and, in countries where the securities regulator has a strong track record on enforcement, it would be advisable to grant the regulator full powers to directly intervene and enforce antifraud regulations.

6.5 Public versus private offering framework for HBOR

The choice of introducing the HBOR as part of the public offer or private placement domain depends on the country's specific legal framework, in terms of both securities issuance as well as investment policies for institutional investors. Usually implementing a legal change is a much more complex undertaking, and, for this reason, countries prefer to work with the existing legal framework to introduce the HBOR. For example, if the concept of private offerings is nonexistent in a country's securities laws, it would probably be more convenient to have the HBOR reside within the public offering framework. But if private offerings exist and have relatively wide usage, carving out the HBOR as a variation of private offerings could be a viable alternative. However, the latter decision would need to be weighed against existing investment regulations, which may or may not allow, say, pension funds, to participate in private placements, unless it is deemed feasible to modify investment regulations accordingly.

That said, conceptually it may seem more natural to introduce an HBOR under a private placement framework, because the designation as a "public offer" triggers certain expectations by the IOSCO principles, such as a regulator's duty to conduct a thorough review of issuers' information. To introduce an HBOR within a public offer framework might require introducing provisions to counter these traditional expectations in order to allow the regulator to reduce disclosure requirements and conduct a faster review or eliminate the review and/or approval process altogether. This could be seen as a more convoluted way to introducing an HBOR, and, for this reason, it would be advisable to try to introduce an HBOR on the private placement side, assuming that a country's legal and regulatory environment is conducive to this option.

6.6 Conducive intermediary and investment regulations

The entire HBOR approach is predicated on the notion of "outsourcing" certain regulatory functions to professional market players—institutional investors and intermediaries. Institutional investors are deemed to have sufficient knowledge and resources to analyze opportunities and risks related to corporate bond issues and thus are thought to not require regulators' detailed review and scrutiny of disclosure information. Intermediaries involved in the issuance process, such as investment banks and legal advisors, are responsible for conducting robust due diligence and preparing high-quality disclosure documents to protect against fraud. They are also the ones accountable for ensuring that HBOR securities do not leak to retail investors, for whom these

investments are not intended, although the regulator's role in checking and enforcing their compliance with the latter is still critical, as mentioned above.

As such, it is important to ensure that both institutional investors and intermediaries are indeed present, adequately developed and professionalized, and properly regulated. This may require strengthening certain regulations, as well as investing resources to build their capacity and professionalism. Moreover, in some countries, absence of a legal definition or recognition of sophisticated or professional investors can serve as a significant hurdle to introducing alternative issuance mechanisms. Among others, regulatory aspects could include the following: (1) clear definitions of different types of investors, (2) clear suitability rules on which types of investors are eligible to purchase which securities, and (3) requirements for intermediaries to conduct thorough assessments to ensure suitability of investors. Conduct regulations need to be clear and comprehensive, avoiding creation of any loopholes, and, most importantly, be strongly enforced.

It may also be necessary to adjust regulatory frameworks of institutional investors (e.g., investment guidelines for pension funds) to make them more conducive and to allow these investors to purchase securities issued via an HBOR. Without such matching regulations, improvements adopted in the primary market framework may be in vain, because issuers will not be able to tap key investors and will be urged to go back to using the public offer channel.

Finally, as an extension of the intermediaries segment, it is relevant to consider the level of professional standards in the accounting, auditing, legal, and other similar practices, all of which are expected to play their respective parts in exerting appropriate market discipline to allow the regulator to “outsource” its regulatory functions to market professionals as part of an HBOR. In case of serious breaches or concerns in these important ancillary practices, it may be advisable to maintain certain protections in the regulatory framework when adopting an HBOR.

Thus, it is critical to look at the broader regulatory picture when thinking about implementing an HBOR, ensuring that not only primary market conditions are defined and adequate, but also that other key elements—regulations, enforcement, and professionalism of intermediaries and investors, as well as possible other advisory practices—are in place.

6.7 Areas for further research

Many issues analyzed above raise additional questions and would benefit from further research to gain a deeper understanding of specific aspects and practices, as well as benefits and implications, of HBORs for corporate bond market development. Some areas for future research include the following:

- The use of specialized trading platforms, reporting practices, and clearing and settlement issues
- Regulator's specific mandate in enforcing antifraud provisions
- Arriving at reduced disclosure requirements for HBOR securities
- Practices to ensure professionalism of institutional investors
- More in-depth definition of qualified investors and of the composition of actual investors purchasing HBOR securities

7. Conclusion

The country experiences analyzed in this paper show that to stimulate growth in the corporate bond market it is important to introduce regulatory flexibility and broaden the range of offering mechanisms in the primary market to accommodate diverse needs of corporate issuers, depending on their size, industry, and length of operation, and whether they are recurring, first-time, or one-time-only issuers (e.g., infrastructure projects). This can be done by increasing available issuance options both within and outside the public offer framework, namely, introducing (1) fast-track public offer initiatives, such as shelf-registrations and automatic approvals for seasoned issuers; and (2) alternative issuance regimes, such as private placements and HBORs. In designing these regulations, policy makers should be mindful of the types of investors that predominantly invest in corporate bonds—institutional or high net worth—that do not require the same level of protections that are needed for retail investors and equity instruments.

This variety of issuance options represents a critical factor in facilitating access to bond markets by a larger and more diverse group of companies. In parallel to these efforts, regulators should aim to improve the overall efficiency of the traditional public offer regime, so that it can continue to serve those issuers that find value in this offering regime based on their needs.

HBORs, which were the focus of the above analysis, are a key part of increasing the flexibility of the primary market regulatory framework. They seem to achieve the desired balance between *sufficient flexibility for issuers* to encourage greater access to bond financing and *adequate investor protections* to attract investment interest from target investors, such as regulated institutions (e.g., pension funds and insurance companies). This combination of flexibility and protections can help to stimulate greater issuance of corporate bonds. The issuance trends analyzed in the three country cases—the United States, Brazil, and Thailand—seem to point in this direction, as we saw that the introduction of an HBOR in these countries may have had a positive impact on encouraging new, less established issuers to come to market.

Although there is much variation globally across HBORs, the following salient features emerge from the above country analysis:

- (i) Investment limited to qualified investors, usually institutional investors and/or HNWIs
- (ii) Reduced initial and ongoing disclosure requirements
- (iii) Limited role of the regulator, if any, in the approval process
- (iv) Unrestricted access to secondary market trading, usually OTC, for eligible investors (i.e., institutional/HNWI) and
- (v) Continued provision of antifraud protections by the regulator against false or misleading statements in initial or ongoing disclosures.

There is no one-size-fits-all model when introducing flexibility into the primary market issuance framework. The great diversity of regimes reviewed in this study suggests that regulations need

to be tailored, taking into consideration the particular economic, market, and overall regulatory context of a given country, while keeping in mind the critical elements discussed above.

Finally, it is important to keep in mind that introducing HBOR-like issuance channels is just one of the measures in the regulator's toolkit, albeit an important one, to try to stimulate NG bond issuance—it does not encompass the whole “value-chain” of a bond transaction. A number of other measures, such as building capacity of institutional investors, introducing flexible investment rules, and, developing appropriate instruments (e.g., securitizations, guarantees), could be necessary to complete the picture, in addition to more structural factors (e.g., private sector composition, level of savings) that may need to be overcome.

Appendix 1: U.S. Qualified Institutional Buyer Definition

(a) *Definitions.* (1) For purposes of this section, *qualified institutional buyer* shall mean:

- (i) Any of the following entities, acting for its own account or the accounts of other qualified institutional buyers, that in the aggregate owns and invests on a discretionary basis at least \$100 million in securities of issuers that are not affiliated with the entity:
 - (A) Any *insurance company* as defined in section 2(a)(13) of the Act;
 - (B) Any *investment company* registered under the Investment Company Act or any *business development company* as defined in section 2(a)(48) of that Act;
 - (C) Any *Small Business Investment Company* licensed by the U.S. Small Business Administration under section 301(c) or (d) of the Small Business Investment Act of 1958;
 - (D) Any *plan* established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees;
 - (E) Any *employee benefit plan* within the meaning of title I of the Employee Retirement Income Security Act of 1974;
 - (F) Any trust fund whose trustee is a bank or trust company and whose participants are exclusively plans of the types identified in paragraph (a)(1)(i) (D) or (E) of this section, except trust funds that include as participants individual retirement accounts or H.R. 10 plans.
 - (G) Any *business development company* as defined in section 202(a)(22) of the Investment Advisers Act of 1940;
 - (H) Any organization described in section 501(c)(3) of the Internal Revenue Code, corporation (other than a bank as defined in section 3(a)(2) of the Act or a savings and loan association or other institution referenced in section 3(a)(5)(A) of the Act or a foreign bank or savings and loan association or equivalent institution), partnership, or Massachusetts or similar business trust; and
 - (I) Any *investment adviser* registered under the Investment Advisers Act.
- (ii) Any dealer registered pursuant to section 15 of the Exchange Act, acting for its own account or the accounts of other qualified institutional buyers, that in the aggregate owns and invests on a discretionary basis at least \$10 million of securities of issuers that are not affiliated with the dealer, Provided, That securities constituting the whole or a part of an unsold allotment to or subscription by a dealer as a participant in a public offering shall not be deemed to be owned by such dealer;
- (iii) Any dealer registered pursuant to section 15 of the Exchange Act acting in a riskless principal transaction on behalf of a qualified institutional buyer;
- (iv) Any investment company registered under the Investment Company Act, acting for its own account or for the accounts of other qualified institutional buyers, that is part of a family of investment companies which own in the aggregate at least \$100 million in securities of issuers, other than issuers that are affiliated with the investment company or are part of such family of investment companies. *Family of investment companies* means any two or more investment companies registered under the Investment Company Act, except for a unit investment trust whose assets consist solely of shares of one or more registered investment companies, that have the same investment adviser (or, in the case of unit investment trusts, the same depositor), Provided That, for purposes of this section:
 - (A) Each series of a series company (as defined in Rule 18f-2 under the Investment Company Act [17 CFR 270.18f-2]) shall be deemed to be a separate investment company; and
 - (B) Investment companies shall be deemed to have the same adviser (or depositor) if their advisers (or depositors) are majority-owned subsidiaries of the same parent, or if one investment company's adviser (or depositor) is a majority-owned subsidiary of the other investment company's adviser (or depositor);
- (v) Any entity, all of the equity owners of which are qualified institutional buyers, acting for its own account or the accounts of other qualified institutional buyers; and
- (vi) Any bank as defined in section 3(a)(2) of the Act, any savings and loan association or other institution as referenced in section 3(a)(5)(A) of the Act, or any foreign bank or savings and loan association or equivalent institution, acting for its own account or the accounts of other qualified institutional buyers, that in the aggregate owns and invests on a discretionary basis at least \$100 million in securities of issuers that are not affiliated with it and that has an audited net worth of at least \$25 million as demonstrated in its latest annual financial statements, as of a date not more than 16 months preceding the date of sale under the Rule in the case of a U.S. bank or savings and loan association, and not more than 18 months preceding such date of sale for a foreign bank or savings and loan association or equivalent institution.

Source: Electronic Code of Federal Regulations, Title 17, Chapter II, Part §230.144A. Private resales of securities to institutions. August 29, 2014. Notes within the definition have been omitted.

Appendix 2: Hybrid Issuance Regime—Select Country Cases

In this appendix, hybrid offer regime (HBOR) is referred to and analyzed according to the definition and descriptions put forth in section 3. As stated there, such regimes do not officially exist in the legal framework of the countries analyzed; rather they are identified and analyzed based on specific conditions in the countries' various laws and regulations that satisfy the HBOR definition formulated in that section.

The analysis focuses specifically on hybrid offers made by companies that are not already publicly registered, reporting companies, given our interest in examining the ability of the HBOR to facilitate access to bond financing for nonpublic, less established, and new issuers. This focus is made particularly in the context of specific requirements for issuance and available protections. In estimating the volume of issuance under the HBOR (i.e., relative importance of the regime), in most cases, it was not possible to separate out issuance only by nonpublic companies.

The relative share of HBOR against total nongovernment debt issuance is as of 2010, with more updated figures provided for select countries, where available.

Securities issued under the HBOR are referred to as “hybrid offer securities.”

Brazil

Brief description of the primary market regulatory framework

The primary market regulatory framework in Brazil is characterized by pure public, pure private, and hybrid issuance regimes. For public offerings, a unique dual registration system requires separate registration of the issuing company and the securities offer. The company registration is a more arduous and lengthy process of the two that can take up to 90 business days. As a result, often companies register with the securities regulator, Comissão Nacional de Valores (CVM), even before they decide to make a securities offer to speed the process when the market conditions are right for issuance, although the two registrations can be done simultaneously.

The pure private placement regime falls under the Corporation Law and is completely outside the purview of CVM. No specific conditions or requirements are stipulated for this regime, but, in practice, the number of investors tends to be small, submission of an offer document or compliance with continuous disclosure obligations is not required, and trading is fairly limited.

The HBOR was introduced in 2009 as a result of a long-term study that concluded that the market needed a faster and less bureaucratic system for issuance. Notably, the regime waives the company registration requirement for issuers and replaces the security registration with a simple notification to the regulator before and after the initial sale. In 2010, the first year after its introduction, corporate bond issuance markedly shifted toward the HBOR, which accounted for around 69 percent of total issuance, increasing to 94 percent in 2014. Importantly, there was also a significant boost in the number of issuers coming to the market in absolute terms, as well as through the hybrid offer channel: The number of total issuers increased from 74 in 2006 to 222 in 2013 (Q3), with 93 percent (of 222) using the HBOR.

Key Features of the Hybrid Offer Regime

Official name of the HBOR or regulation and year of adoption	Restricted Efforts Offering stipulated by Instruction 476 adopted in 2009 and amended in September 2014.
Nature of the regime	Exempt public offer
Relative importance of the regime (percentage of total issuance, 2010)	69% in 2010. 94% in 2014.
Key conditions for initial offering	Securities must be purchased by a maximum of 50 Qualified Institutional Buyers (QIBs). During the subscription period, they can be offered to a maximum of 75 QIBs, but final purchasers cannot exceed 50. ³⁴

³⁴ These thresholds were recently increased as part of the amendment to Instruction 476 in September 2014. Previously, hybrid offer securities could be offered to a maximum of 50 QIBs with final purchasers not exceeding 20.

Does the regime require submission of a <i>full prospectus</i> to the regulator/SRO?	No. It also exempts issuers under the HBOR from the company registration requirement of the dual registration system that is in place for public offers.
Does the regime require submission of any kind of offer document or information notice to the regulator/SRO?	Yes
Type of document to be submitted and timing of submission	Issuers are required to file with CVM an offer commencement announcement within five business days from the first investor roadshow and a conclusion announcement, including results of the sale, within five days after the sale. ³⁵
Does the document need to be approved by the regulator/SRO? If so, within what time frame?	No
What are the conditions for trading?	Can be traded among QIBs after a 90 day holding period.
Are hybrid offer securities listed on the exchange?	Usually no, because they are not allowed to be listed unless the issuer is a public company registered with CVM. If the latter requirement is met, a hybrid offer security can be listed without having to go through a full prospectus disclosure and registration process with the regulator required for traditional public offers.
How is trading conducted?	Mainly OTC
Are issuers subject to continuous disclosure requirements?	Yes, but the requirements are lighter. For example, hybrid issuers are not required to disclose quarterly financial statements (only annual statements) and notification of material events can be done electronically.
Are issuers and intermediaries held accountable by the securities regulator or a law or regulation for <i>false or misleading statements</i> related to securities issued via the HBOR?	Yes. CVM has the mandate to intervene in case of fraud related to securities issued under the HBOR. By contrast, it does not have this mandate for securities issued via the pure private placement regime.

³⁵ The requirement to file an offer commencement announcement was only recently introduced as part of the September 2014 amendments to Instruction 476.

Chile

Brief description of the primary market regulatory framework

Chile introduced a number of regulatory amendments to its securities market framework, beginning in 2001, among which were the following:

- Introduction of a shelf registration scheme
- Elimination of the requirement to pay stamp taxes on each tranche under shelf registration
- Elimination of the requirement to obtain two credit ratings
- Introduction of the exemption from filing a full prospectus for offers made solely to qualified investors (HBOR)

Chile has three issuance regimes for corporate bonds: pure public offer, exempt public offer (or hybrid regime), and pure private placement (introduced in 2012). Interestingly, despite its relatively early introduction into the regulatory framework (2001), the HBOR has had only one issuance to date. Based on consultations with the securities regulator, Superintendencia de Valores y Seguros (SVS), there could be two possible reasons for this low interest:

1. Regulations governing institutional investors, particularly pension funds, have not been amended to match the flexibilities allowed under the HBOR, such as, for example, the elimination of the credit rating requirement. Thus, even though the HBOR does not require a credit rating, institutional investors do, resulting in issuers having to continue providing a rating.
2. According to an industry consultation conducted by SVS, issuers and intermediaries do not find it more difficult or costly to file a detailed prospectus, and prefer to do so even if it is not required by regulation. Although this may be true for larger issuers, it may not be the case for smaller, especially first-time, issuers. However, SVS believes that for these issuers, challenges lie more in the upstream preparatory work for bond issuance (e.g., complying with accounting and corporate governance standards) rather than in the preparation of a prospectus.

Although there could be other reasons for this phenomenon, Chile serves as an important example, highlighting the need for appropriate regulatory amendments to take place on the investment side in order to enable issuers to take advantage of benefits provided by the HBOR.

Key Features of the Hybrid Offer Regime

Official name of the HBOR or regulation and year of adoption	Capital Market Reform No. 1 (MK1), 2001, which introduced amendments to the Securities Market Law of 1981
Nature of the regime	Exempt public offer. Securities are treated as registered bonds similar to pure public offers.
Relative importance of the regime (percentage of total issuance, 2010)	0%
Key conditions for initial offering	Offers made to qualified investors
Does the regime require submission	No. Issuers are also exempt from filing a credit rating.

of a <i>full prospectus</i> to the regulator/SRO?	
Does the regime require submission of any kind of offer document or information notice to the regulator/SRO?	Yes, to the securities regulator, SVS
Type of document to be submitted and timing of submission	Simplified prospectus must be submitted to SVS at least 2 days before the first sale. Issuer must indicate on the filing that the offer will be made solely to qualified investors and will thus be eligible for prospectus exemptions.
Does the document need to be approved by the regulator/SRO? If so, within what time frame?	No
What are the conditions for trading?	Hybrid offer securities must be traded solely among qualified investors. Broker dealers are responsible for not allowing retail investors to purchase exempt securities.
Are hybrid offer securities listed on the exchange?	The regulation allows hybrid offer securities to be listed on the exchange. Issuers do not need to meet any additional requirements for listing.
How is trading conducted?	The regulation allows trading to take place both on the exchange and OTC. Trades do not have to be reported.
Are issuers subject to continuous disclosure requirements?	Issuers of hybrid offer securities are subject to continuous disclosure requirements, which are very similar to those for public offers.
Are issuers and intermediaries held accountable by the securities regulator or a law or regulation for <i>false or misleading statements</i> related to securities issued via the HBOR?	Yes

The European Union

Brief description of the primary market regulatory framework

The primary market framework for corporate bonds in the EU is characterized by two main offering regimes: public offers and exempt public offers, or HBOR. A form of HBOR was first introduced in 1980 by the EU Council Directive (80/390/EEC), followed up with the 1989 Council Directive (89/298/EEC) and finally replaced by the most comprehensive framework laid out in the Prospectus Directive of 2003, which went into effect in 2005. The last was subsequently amended in 2010 with changes going into effect in July 2012. No pure private placement regime exists at the EU-legislative level; particular member states may have such regimes at the national level. Although the exempt offer regime does not differentiate between debt and equity, the most natural users of this issuance channel are issuers of corporate debt.

The particularly interesting feature of the EU HBOR is the condition that stipulates that offers with a minimum denomination of €100,000 or greater are exempt from filing a prospectus. Although four other possible conditions exist for prospectus exemption, this is the most commonly used and preferred condition because it is the easiest to control, the requirement being basically “hard-wired” into the offer. The high denomination serves to prevent the securities from being purchased and traded by retail investors.³⁶

Although the EU HBOR does not place large demands on issuers from a regulatory perspective, the market practice is to still expect issuers going through this channel to provide significant disclosures, often accompanied by a formal listing, which can trigger other requirements. As a result, in practice, this regime is used by relatively large issuers that can comply with the market’s demands. A new initiative led by the International Capital Market Association (ICMA) is underway to develop a new pan-European private placement segment, aimed primarily at unlisted issuance by medium-sized companies. From a regulatory perspective, this regime would also fall under the EU exempt public offer regime but would be distinct in terms of its application by the market.

Key Features of the Hybrid Offer Regime

Official name of the hybrid offer regime or regulation and year of adoption	Prospectus Directive (2003/71/EC)
Nature of the regime	Exempt public offer
Relative importance of the regime (percentage of total issuance, 2010)	65% ³⁷

³⁶ However, it does not provide an absolute guarantee that leakage to the retail sector will not occur.

³⁷ Comprehensive issuance data by offer type (public vs. exempt) within the EU region are not currently available. As an attempt to determine a best estimate, a representative proxy was used based on Eurobond offers with a minimum unit denomination of €50,000 that were listed in 2010 on the Luxembourg Stock Exchange (LuxSE), one of the largest Eurobond listing venues in Europe. Thus, the data try to capture offers taking advantage of prospectus exemptions based on the minimum denomination condition, i.e., offers with a denomination of €50,000 or greater, the existing threshold in 2010. The data include only euro-denominated offers. The main caveats of the analysis are that the data do not take into account offers in other currencies, exempt offers based on conditions other than the minimum denomination, and offers made on a national basis outside the Eurobond markets. *Source:* LuxSE, ICMA consultations, and World Bank calculations.

Key conditions for initial offering	<p>Any of the following five conditions qualify an issue to be exempt from submission of a prospectus.</p> <ol style="list-style-type: none"> 1. An offer of securities addressed solely to qualified investors 2. An offer of securities addressed to fewer than 150 natural or legal persons per Member State, other than qualified investors³⁸ 3. An offer of securities whose denomination per unit amounts to at least €100,000³⁹ 4. An offer of securities addressed to investors who acquire securities for a total consideration of at least €100,000 per investor, for each separate offer⁴⁰ 5. An offer of securities with a total consideration of less than €150,000, which shall be calculated over a period of 12 months⁴¹
Does the regime require submission of a <i>full prospectus</i> to the regulator/SRO?	No
Does the regime require submission of any kind of offer document or information notice to the regulator/SRO?	No, unless the security is listed on a regulated market, which constitutes a major EU exchange. Alternative markets, referred to as “exchanged-regulated markets” (e.g., Alternative Investment Market for equities and Professional Securities Market for debt in London), do not trigger this obligation (however, they may have other requirements of their own).
Type of document to be submitted and timing of submission	<p>If the security is listed on a regulated market, the issuer must submit a prospectus to the regulator for approval. However, issuers of debt securities with a minimum denomination of €100,000 are subject to lighter disclosure requirements, further alleviating the burden for debt issuers targeting institutional investors. Specifically, they are not required to submit a summary of the prospectus⁴² and can submit a lighter version of disclosure annexes that are included in the prospectus.⁴³ This stipulation applies to any debt securities regardless of the offer method.</p>

³⁸ Increased in July 2012 from a previous threshold of 100 persons.

³⁹ Increased in July 2012 from a previous threshold of €50,000.

⁴⁰ Increased in July 2012 from a previous threshold of €50,000.

⁴¹ Increased in July 2012 from a previous threshold of €100,000.

⁴² However, member states may require such summaries through national law.

⁴³ These concern disclosures related to the issuer and those related to the offer.

<p>Does the document need to be approved by the regulator/SRO? If so, within what time frame?</p>	<p>Yes, if listed on a regulated market, the prospectus will need to be approved by the regulator. The exchange will usually only review and file the prospectus; it does not provide an additional approval. The maximum time for approval of the prospectus is 10 business days (or 20 business days if the company is a first-time issuer).</p>
<p>What are the conditions for trading?</p>	<p>Hybrid offer securities are allowed to be traded off-exchange or OTC without an approved prospectus as long as one of the five exemption conditions continues to apply. If this is no longer the case, the holder of the security will need to produce a prospectus at the time of the sale. Considerable debate surrounds the feasibility of doing this in practice.</p>
<p>Are hybrid offer securities listed on the exchange?</p>	<p>Yes, many exempt offer securities are listed on an exchange mainly for the purpose of becoming eligible for investment by certain institutional investors that face restrictions on investing in unlisted securities. Notably, listing on exchange-regulated markets, which fall outside of the EU Prospectus and Transparency Directives and have lighter disclosure requirements, can, in many cases, satisfy the listing condition required by institutional investors.</p> <p>Importantly, listing on a regulated market does not automatically mean that a security that was initially offered on an exempt basis is available for trading by the broader investing public. This is because resales of the security remain in the exempt status, even once listed, so long as they continue to satisfy one of the five exemption conditions. If a resale fails to do so, the seller would need to have an up to date regulator-approved full (i.e., nonexempt) prospectus. If this is indeed the case, the security can be sold to retail investors for the period during which the prospectus continues to be valid and kept up to date. Because there are no built-in automated ex-ante safeguards to ensure compliance with this requirement, it is the responsibility of institutional investors and intermediaries to act as gatekeepers and prevent leakage to retail investors without an approved updated prospectus in place. In practice, the majority of debt securities initially offered to institutional investors are high denomination (i.e., $\geq$ €100,000) and remain in institutional hands regardless of the listing status.</p>
<p>How is trading conducted?</p>	<p>Despite many of the exempt offer securities being listed, trading is almost exclusively conducted OTC.</p>

<p>Are issuers subject to continuous disclosure requirements?</p>	<p>No, unless listed on a regulated market, as stipulated by the Transparency Directive of 2004. However, securities with a minimum denomination of €100,000⁴⁴ are subject to lighter requirements, independent of the offer method.</p>
<p>Are issuers and intermediaries held accountable by the securities regulator or a law or regulation for <i>false or misleading statements</i> related to securities issued via the HBOR?</p>	<p>In general, most issues related to information contained in offer documents are governed by civil liability laws of member states. There is no harmonized EU regulation in this regard. Typically, in case of intended deceit, securities regulators or relevant authorities have a mandate to investigate the matter, whereas cases involving failure of due diligence are typically handled in civil courts.</p>

⁴⁴ The denomination limit was increased from €50,000 to €100,000 as of December 31, 2010. All debt securities issued before that date with a denomination of €50,000 or higher would continue to be able to take advantage of the lighter disclosure requirements.

India	
Brief description of the primary market regulatory framework	
<p>India's primary market framework is characterized by public offers, listed private placements, and unlisted private placements, which made up about 1, 85, and 14 percent of total issuance, respectively, in 2010.⁴⁵ Listed private placements, which were introduced in 2008, represent India's effort to create a type of HBOR that can have the relative flexibilities of a private placement but still provide a degree of protections and transparency to investors and regulators. It was also an attempt to increase transparency of the overall corporate bond market, which was already dominated by private issues but was opaque with very limited information availability.</p> <p>India has also made a number of improvements to the public offer regulations for debt securities. The securities regulator, the Securities and Exchange Board of India (SEBI), has removed itself from the review and approval of the offer document, because companies are no longer required to file a draft offer document with SEBI for its comments. Instead, issuers make the draft offer document available for public comment for a period of seven days on the website of the exchange where they plan to list the security. The issuer's intermediary is then required to submit to SEBI a due diligence certificate stating that all public comments have been incorporated.</p> <p>Despite these process improvements, initial disclosure norms for public debt issues have remained identical to those of public equity securities; these requirements are set by the Companies Act and are outside of SEBI's purview and ability to change. However, in 2009 SEBI adopted differentiated continuous disclosure requirements for public debt securities as a move to lighten public debt issuers' regulatory burden.</p>	
Key Features of the Hybrid Offer Regime	
Official name of the HBOR or regulation and year of adoption	SEBI (Issue and Listing of Debt Securities) Regulations, 2008.
Nature of the regime	Listed private placements
Relative importance of the regime (percentage of total issuance, 2010)	85% ⁴⁶
Key conditions for initial offering	Offers made to maximum 200 investors, excluding qualified institutional buyers (QIBs). Offers by financial institutions are limited to a maximum of 49 investors.
Does the regime require submission of a <i>full prospectus</i> to the	No

⁴⁵ Today India's securities regulator no longer has information on unlisted private placements and tracks only relative share of listed private placements versus public offers. When considering only these two offer types, listed private placements made up 96% of total issuance in 2010. This share has fluctuated $\pm$ less than 10 percentage points since 2010 and was 87% in 2013.

⁴⁶ Ibid.

regulator/SRO?	
Does the regime require submission of any kind of offer document or information notice to the regulator/SRO?	Yes, to a relevant exchange, where the listing is sought. (By contrast, no document is required for pure private placements, i.e., those that are not listed.) No submission is required to the regulator.
Type of document to be submitted and timing of submission	Simplified disclosure requirements along with a term sheet, which include a mandatory credit rating, must be submitted with a relevant stock exchange prior to listing. These disclosures are less onerous than those required for public offers.
Does the document need to be approved by the regulator/SRO? If so, within what time frame?	<p>No. The documents are required to be uploaded on the exchange's website for public comments for at least seven days prior to listing. It is the responsibility of the issuer's intermediary (a registered merchant banker) to ensure that all comments are addressed and incorporated, all material information is provided, and all statutory requirements are complied with. Once this done, the final offer document is filed with the Register of Companies and the security can be listed.</p> <p>The exchange is not required to review the draft offer document or provide any approval. However, it is free to provide comments and ask for additional material information to be included, if it deems so necessary.</p>
What are the conditions for trading?	<p>Hybrid offer securities must be traded among institutional investors in minimum lot size of Rs 10 million (approximately \$160,000) if trading is conducted on the dedicated institutional debt platform of the exchange.</p> <p>No restrictions exist for trading OTC but the market is effectively institutional in nature. Moreover, since the introduction of dedicated debt platforms on exchanges, trading has markedly shifted from OTC to these platforms.</p>
Are hybrid offer securities listed on the exchange?	Yes. They are listed in a dedicated institutional debt segment of the exchange.
How is trading conducted?	Trading is predominantly conducted on dedicated institutional debt platforms provided within the exchanges. Some trading continues to take place OTC, but since the introduction of the dedicated debt platforms, trading markedly shifted to these platforms. All OTC trades are required to be reported to

	designated reporting systems within 15 minutes of trade execution.
Are issuers subject to continuous disclosure requirements?	Yes, issuers of listed private debt securities must provide ongoing disclosures to the exchange, where they are listed. These requirements are slightly lighter than those for public offers if the issuer does not have other publicly listed securities, in which case they are the same.
Are issuers and intermediaries held accountable by the securities regulator or a law or regulation for <i>false or misleading statements</i> related to securities issued via the HBOR?	Yes. The SEBI (Issue and Listing of Debt Securities) Regulations, 2008 cast responsibility on issuers and merchant bankers to ensure that false or misleading statements are not made. SEBI has the powers under the SEBI Act, SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Markets) Regulations, and SEBI (Prohibition of Insider Trading) Regulations to enforce these regulations.

Israel

Brief description of the primary market regulatory framework

Israel's primary market issuance framework for corporate bonds is characterized mainly by a pure public offer regime, accounting for about 88 percent of total corporate bonds listed in the Tel-Aviv Clearing House by volume in 2010. The remainder is represented by private placement issuance, which includes the HBOR and private placements by reporting (public) companies.⁴⁷ In addition, there are also pure private placements; data for these are not widely available because they are not listed on any trading venue or clearing house and are completely outside the regulatory purview.

The HBOR, which is based on the private placement regulation, was introduced in 2005 and created an outlet for institutional investors to trade bond securities offered via a private placement (i.e., without a prospectus) in a fast and efficient manner in a specialized trading system—TACT Institutional. The addition of this feature to the private placement framework is what constitutes this a HBOR.

In 2010 the HBOR still accounted for a relatively small share of total issuance,⁴⁸ as the market appeared to continue to be dominated by a culture of public offers and exchange trading.

Other measures that have been important for strengthening the primary market framework in Israel include the following:

- Enhancements to disclosures related to protecting bond holders
- Amendments to the Companies Law imposing corporate governance requirements for bond issuers (that issue bonds but do not issue equity) and introducing changes as to how debt settlements under a court-sponsored expert guidance are made
- Amendment of the Securities Law strengthening the role and obligation of bond holder trustees to better serve bond holder interests.

Key Features of the Hybrid Offer Regime

Official name of the HBOR or regulation and year of adoption	Securities Law, 1968, Section 15A. Specific sections related to the HBOR were amended in 2000, 2004, 2005, and 2011.
Nature of the regime	Private placement with easy access to secondary market trading
Relative importance of the regime (percentage of total issuance, 2010)	8% in 2010; ⁴⁹ 26.5% as of September 2014 ⁵⁰

⁴⁷ Those with at least some securities (debt or equity) being held by the public.

⁴⁸ Private placement securities trading on TACT Institutional made up 8% of total corporate bonds listed in the Tel-Aviv Clearing House in 2010. However, because these include offers by both reporting and nonreporting corporations, the actual share of nonreporting corporations, which are the focus of this study, is estimated to be somewhat smaller than 8%.

⁴⁹ Ibid.

⁵⁰ Although 2014 shows an increase compared with 2010, the share of HBOR issuance has fluctuated over the years, including decreases in some years.

Key conditions for initial offering	Offers made to institutional investors.
Does the regime require submission of a <i>full prospectus</i> to the regulator/SRO?	No
Does the regime require submission of any kind of offer document or information notice to the regulator/SRO?	Yes, to the exchange
Type of document to be submitted and timing of submission	Description of the securities and details regarding the trust deed must be submitted prior to listing the securities on TACT (Tel-Aviv Continuous Trading) Institutional, a standalone trading system within the exchange.
Does the document need to be approved by the regulator/SRO? If so, within what time frame?	No
What are the conditions for trading?	Can be traded among institutional investors on TACT Institutional. Securities are not subject to any holding period; thus, trading can begin immediately following the issuance.
Are hybrid offer securities listed on the exchange?	No, listing on the exchange would require submission of a full prospectus.
How is trading conducted?	Trading is conducted on TACT Institutional. Although OTC trading is allowed, the vast majority of hybrid offer securities are traded through TACT Institutional and the OTC market is very small. The latter is the case, in general, for all bonds in Israel, where exchange trading dominates. OTC trades in securities listed on TACT Institutional or the exchange must be reported to the clearing house.
Are issuers subject to continuous disclosure requirements?	No, only reporting companies are subject to continuous disclosure requirements.
Are issuers and intermediaries held accountable by the securities regulator or a law or regulation for <i>false or misleading statements</i> related to securities issued via the HBOR?	Yes. Section 54 of the Securities Law includes a general provision on fraud, which requires issuers and intermediaries to be accountable for the truthfulness and accuracy of the information disclosed as part of the offer of securities. This provision applies to securities issued via both public and private issuance channels.

Malaysia	
Brief description of the primary market regulatory framework	
<p>Malaysia implemented significant regulatory enhancements to its primary market framework beginning in 2000, including the following:</p> <ul style="list-style-type: none"> • Introduced a disclosure based approval framework • Introduced shelf registration • Eliminated the minimum rating requirement (but obtaining a rating remained mandatory)⁵¹ • Removed the underwriting requirement • Eliminated restrictions on utilization of proceeds from corporate bond issuance <p>The introduction of the disclosure-based framework significantly reduced the time it took to approve new issues from one to three months to 14 business days.</p> <p>Malaysia has two main issuance regimes for corporate bonds: public offer and HBOR, which represent 1 and 99 percent of total issuance, respectively. The HBOR was introduced in 2007 and its overwhelming level of issuance indicates its widespread appeal among issuing companies. However, there is more of a subtle difference between the HBOR and the pure public offer regime, mainly in the amount of information that needs to be disclosed, with regulatory approval applying to both regimes equally, possibly explaining such a wide use of the hybrid issuance channel.</p>	
Key Features of the Hybrid Offer Regime	
Official name of the HBOR or regulation and year of adoption	“Excluded offers,” “excluded invitations” or “excluded issues,” defined in Schedules 6 and 7 of the Capital Markets and Services Act 2007 (CMSA). The HBOR is also interchangeably referred to as private placements or institutional offerings.
Nature of the regime	Private placement with secondary market trading. However, because of certain features (e.g., submission and approval of documents), the regime is actually closer to pure public offers rather than private placements.
Relative importance of the regime (percentage of total issuance, 2010)	99%
Key conditions for initial offering	Offers made to AIs, HNWEs and HNWIIs.
Does the regime require submission of a <i>full prospectus</i> to the regulator/SRO?	No
Does the regime require submission of any kind of offer document or	Yes, to the Securities Commission (SC).

⁵¹ The mandatory rating requirement will be lifted effective January 1, 2017.

information notice to the regulator/SRO?	
Type of document to be submitted and timing of submission	Principal Terms and Conditions, whose information requirements are considerably lighter than those of a full prospectus, and mandatory credit rating must be submitted to the SC before issuance. In addition, if issuers choose to provide an Information Memorandum (IM) or Disclosure Document (DD) to investors, they are required to also deposit a copy of the IM/DD with the SC. The issuance of an IM is voluntary and the SC does not prescribe its contents.
Does the document need to be approved by the regulator/SRO? If so, within what time frame?	Yes, the review and approval can take up to 14 business days, which is the same timeframe as for public offers.
What are the conditions for trading?	Can be traded only among AIs, HNWEs and HNWIs.
Are hybrid offer securities listed on the exchange?	Listing of hybrid offer bonds by nonpublic companies was introduced in 2008. Prior to this, only public companies listed bonds that were predominantly equity-linked in nature. While this initiative has increased issuers' interest to list exempt issues, the predominant practice of issuers still is not to list. In general, there are no additional requirements for listing beyond the disclosures required for initial issuance.
How is trading conducted?	The majority of trades are transacted OTC, and all OTC trades are reported to the Electronic Trading Platform operated by the exchange.
Are issuers subject to continuous disclosure requirements?	Yes, but the requirements are generally lighter if the issue is not listed. For example, there are no periodic disclosure requirements, only a requirement to report to the trustee and the SC on the occurrence of material events. If hybrid offer securities are listed, the issuer is subject to disclosure requirements of the exchange. For issues made under the Medium-Term Note (MTN) program, continuous disclosure requirements are governed by market practice.
Are issuers and intermediaries held accountable by the securities regulator or a law or regulation for false or misleading statements related to securities issued via the HBOR?	Yes. The CMSA 2007 holds parties involved in the issuance process accountable for any misrepresentation of information. In addition, the SC practices strong supervision over bond market intermediaries, such as credit rating agencies, bond trustees, and bond pricing agencies, to ensure their competence and compliance with relevant guidelines and requirements.

Thailand

Brief description of the primary market regulatory framework

Thailand began introducing regulatory flexibility to its primary market framework for corporate bonds beginning in 2002. Among others, this included the following:

- Introducing a shelf registration scheme
- Permitting international credit ratings
- Reducing the time frame for approval and disclosure of information for public bonds from 30 to 14 calendar days and from three to one business day for subsequent public offers
- Reducing filing fees for all long-term debt securities and for short-term debt offered to institutional and high net worth (HNW) investors.

The primary market framework is characterized by three offering channels: pure public offer, pure private placement, and HBOR, each representing 38, 19, and 43 percent of total issuance value in 2010, respectively. Notably, the HBOR, which was introduced in 2006, is available exclusively for debt securities, recognizing its particular applicability to fixed income instruments, whose predominant investors are institutional or HNW. Despite its short existence, the HBOR appears to be widely embraced by issuers, with the value of issuance through this channel growing from 23 percent of total issuance in 2007, the first year after its introduction, to 85 percent in 2013.

The pure private placement regime is characterized by standard private placement elements, such as limited number of investors (10) and strict conditions on transferability but has the least amount of disclosure requirements. In addition, unlike the HBOR, the SEC does not have the mandate to protect investors in case of fraud associated with a privately placed issue, delegating this function to the courts.

Initially introduced as private placements for institutional and HNW investors, the HBOR underwent an update and a name change to private placement for accredited investors (AIs) in July 2012. “AI” still refers to institutional and HNW investors, but their definitions were updated to make them more flexible and consistent with international practices and local market realities. The other change introduced by the new AI regime is the classification of certain investments as AI products, which means that these products can only be offered to AIs. These include, among others, unrated plain vanilla bonds and AI funds, which have more flexible investment limits for riskier instruments. With these changes, the AI regime, in effect, allowed plain vanilla bonds to be issued without a credit rating if offered solely to AIs; previously, all securities being issued through the HBOR had to have a mandatory credit rating.

Key Features of the Hybrid Offer Regime

Official name of the HBOR or regulation and year of adoption

Notification of Capital Market Supervisory Board No. TorChor 10/2552 Re: Filing of Registration Statement for Offer for Sale of Debt Securities, Dated March 31, 2009, which replaced Notification of the Securities and Exchange Commission No. KorYor. 40/2549 Re: Filing and Exemption from Filing of Registration Statement for Offer for Sale of Debt Securities, Dated November 15, 2006.

Last amendment in 2012.

Nature of the regime	Private placement with secondary market trading. However, because of certain features (e.g., submission and approval of documents), the regime is actually closer to pure public offers rather than private placements.
Relative importance of the regime (percentage of total issuance, 2010)	43% in 2010, 85% in 2013
Key conditions for initial offering	Offers made to accredited investors, which include institutional and HNW investors
Does the regime require submission of a <i>full prospectus</i> to the regulator/SRO?	No
Does the regime require submission of any kind of offer document or information notice to the regulator/SRO?	Yes to the securities regulator and the Thai Bond Market Association (ThaiBMA)
Type of document to be submitted and timing of submission	Registration statement and draft prospectus, both in short-form, as well as a credit rating (if applicable), must be submitted with the regulator at least one business day before the first sale and to ThaiBMA within 30 days after the first sale.
Does the document need to be approved by the regulator/SRO? If so, within what time frame?	Yes. The registration is essentially automatic, as it becomes effective in one business day.
What are the conditions for trading?	Can be traded only among institutional and HNW investors.
Are hybrid offer securities listed on the exchange?	Listing is technically allowed, but no hybrid offer issues are listed in practice.
How is trading conducted?	All trading of hybrid offer securities takes place OTC.
Are issuers subject to continuous disclosure requirements?	Yes, but the requirements are less onerous than those for pure public offers.
Are issuers and intermediaries held accountable by the securities regulator or a law or regulation for <i>false or misleading statements</i> related to securities issued via the HBOR?	Yes, but within a limited time following an offer. Investors' claim for compensation must be made within one year from the date on which fraudulent information was revealed but not exceeding two years following the effective date of the registration statement and draft prospectus.

The United States

Brief description of the primary market regulatory framework

The U.S. primary market issuance framework is characterized by the pure public offer, pure private placement, and hybrid offer regimes. The public offer framework includes shelf registration statements, automatic ally effective shelf registration statements for “well-known seasoned issuers,” and simplified registration statements⁵² that have been adapted for smaller reporting companies and emerging growth companies.

Although a form of private placement regime was incorporated into the Securities Act of 1933, which stipulated a prospectus exemption for nonpublic offerings, the language of the Act lacked specificity and created much uncertainty among issuers wishing to take advantage of this exemption. Following various court cases on this subject, the U.S. Securities and Exchange Commission (SEC) adopted in 1982 Regulation D (Reg D), a non-exclusive “safe harbor”⁵³ rule for private offerings, which put in place definitive requirements for issuing securities under the private offering exemption.

Rule 506⁵⁴ of Reg D allows companies to raise unlimited amount of capital without filing a registration statement if securities are sold to an unlimited number of *accredited* and up to 35 *sophisticated* investors. Securities issued under Reg D are deemed to be restricted securities, are subject to a holding period of one year for nonreporting companies,⁵⁵ and may not be freely traded unless fully registered or until the expiration of the holding period provided in the Rule 144 safe harbor.⁵⁶

To facilitate resale of privately placed securities under Reg D, the SEC introduced in 1990 Rule 144A, which allowed resales of restricted securities immediately after their placement to *qualified institutional buyers (QIBs)*, which essentially constitute institutional investors with at least \$100 million invested in securities, a definition that is stricter than that of *accredited* investors and thus would satisfy the Reg D requirement as well.

Together, Reg D and Rule 144A, in essence, represent the HBOR of the United States: Reg D provides provisions for issuance without a registration statement (private placements) and Rule 144A for resales of privately placed securities.⁵⁷ Thus, issuers willing to take advantage of the resale option usually limit investors to QIBs (rather than accredited investors) at the time of issuance to make sure that their issue satisfies the Rule 144A requirements.

⁵² Through Form S-1

⁵³ *Safe harbor* usually refers to a provision in a law or regulation that provides protection from liability or penalty if certain conditions are met.

⁵⁴ Rules 504 and 505 of Regulation D provide non-exclusive safe harbor from registration for offers of up to \$1 million and \$5 million of securities over a 12-month period, respectively.

⁵⁵ Nonreporting companies are those that do not have any publicly offered securities outstanding and registered with the SEC. For reporting companies, the holding period is six months for persons who are not affiliates of the companies. An affiliate of a company is a person that, directly, or indirectly through one or more intermediaries controls, or is controlled by, or is under common control with, the company.

⁵⁶ Rule 144 may limit the amount of securities that can be sold at one time and may restrict the manner of sale, depending on whether the security holder is an affiliate.

⁵⁷ Besides Reg D, issuers can also rely on Section 4(a)(2) of the 1933 Act for making private offerings, which is the original provision for nonpublic offerings.

The HBOR gained much popularity among issuers, especially for high-yield and more complex structured issues, for which preparing and registering a retail registration statement with the SEC did not add much value, given their natural focus on institutional as opposed to retail investors. Although overall 144A issuance has accounted for about 20 to 30 percent of total corporate bond issuance over the last 15 years, in the high-yield segment, 144A issuance represented an average of 72 percent of total issuance.⁵⁸ The regime has added considerable liquidity to the private placement market,⁵⁹ maintaining certain investor protections while facilitating speed to market, all of which has contributed to the growth of the U.S. corporate bond market.

Key Features of the Hybrid Offer Regime

Official name of the HBOR or regulation and year of adoption	Section 4(a)(2) of the 1933 Act, Regulation D, 1982 and Rule 144A, 1990
Nature of the regime	Private placement with secondary market trading
Relative importance of the regime (percentage of total issuance, 2010)	28% in 2010, 24% in 2013 ⁶⁰
Key conditions for initial offering	Sales made to initial purchaser (who acts in a capacity similar to an underwriter) based on an exemption or safe harbor, such as Section 4(a)(2) or Regulation D. Typically the initial purchaser is an accredited investor with the intention to sell to QIBs. ⁶¹
Does the regime require submission of a <i>full prospectus</i> to the regulator/SRO?	No
Does the regime require submission of any kind of offer document or information notice to the regulator/SRO?	No, unless the private offering is made in reliance on Reg D
Type of document to be submitted and timing of submission	If the private offering is made in reliance on Reg D, the issuer is required to submit Form D to the SEC, which is a short document with basic information about the issuer and the offer. The submission is made only for information purposes. In practice, most hybrid offer issuers provide investors an offering memorandum that is often comparable to the amount

⁵⁸ Source: Thomson Financial (Thomson One Banker-Deals Module), SIFMA, and World Bank calculations.

⁵⁹ In relative terms, given the generally less liquid nature of debt markets^{002E}

⁶⁰ Source: Thomson Financial (Thomson One Banker-Deals Module), SIFMA, and World Bank calculations.

⁶¹ Because the U.S. HBOR is constituted by the combination of the pure private placement regime (Regulation D or Section 4(a)(2) of the 1933 Act) and the resale of private securities (Rule 144A), the key conditions for the HBOR are derived based on offers that are ultimately targeting the 144A treatment, or are intended to be sold to QIBs. The private placement regime on its own stipulates that securities can be sold to an unlimited number of accredited and up to 35 sophisticated investors. Thus, offers targeting the 144A treatment are initially purchased by an underwriter, typically an accredited investor, with the intention of distributing the securities to QIBs. The QIB definition is stricter than that of accredited investors.

	of information contained in a public offering. This is in part because issuers and intermediaries involved in a hybrid offering are still subject to antifraud regulations (U.S. SEC Rule 10b-5).
Does the document need to be approved by the regulator/SRO? If so, within what time frame?	N/A
What are the conditions for trading?	Can be traded among QIBs immediately after placement. Otherwise, subject to a one-year holding period for nonreporting companies and six-month holding period for reporting companies, after which it can be traded among any investors. For the latter to occur, the issuer's counsel would be required to issue legal opinions indicating that the holding periods have been satisfied. In practice, Rule 144A securities are often considered "144A for life" and are resold only among QIBs.
Are hybrid offer securities listed on the exchange?	Usually no, although they can be listed upon fulfillment of appropriate listing requirements, which are the same as for public offers
How is trading conducted?	144A securities are predominantly traded OTC but are subject to trade reporting requirements under the Trade Reporting and Compliance Engine (TRACE) rules, which requires that all OTC transactions in debt securities be reported within 15 minutes from the trade.
Are issuers subject to continuous disclosure requirements?	No. However, under Rule 144A, holders or prospective purchasers of hybrid securities designated by the holders have the right to obtain from the issuer: (1) a brief description of the issuer's business, products, and services; (2) the issuer's most recent balance sheet, profit and loss statement, and retained earnings statement; and (3) similar financial statements for the two preceding fiscal years.
Are issuers and intermediaries held accountable by the securities regulator or a law or regulation for false or misleading statements related to securities issued via the HBOR?	Yes. Issuers and intermediaries are subject to the U.S. SEC Rule 10b-5, which prohibits fraud or deceit in connection with the purchase or sale of any security. The rule provides the SEC with the mandate to intervene in both public and private cases.

Appendix 3. Antifraud Provisions Related to Hybrid Offer Regimes: Select Country Experiences

1. Brazil

A. Relevant antifraud laws and regulations

The following are the relevant laws and regulations.

- Law 6.385 of December 7, 1976 (the "Securities Act");
- CVM Instruction 476/09 – Regulates the **Restricted Efforts Offerings (Hybrid Offers)**;
- CVM Instruction 358/02 – Regulates the disclosure of material facts.

Moreover, CVM Instruction 400/03 – Regulates the public offers for the distribution of securities in primary and secondary markets.

The Securities Act

- According to article 8, item I, the Securities Commission of Brazil (CVM) shall permanently supervise and oversee the activities and services of the securities market, as well as the disclosure of information relating to the market, individuals participating in it and the securities traded thereon;
- Article 9, item V provides that the CVM may investigate, through administrative proceedings, illegal acts and inequitable practices of managers, members of the audit committee and shareholders of publicly-held corporations, intermediaries, and other market participants;
- Article 27-C provides that engaging in fraudulent transactions or other deceitful action aiming at artificially changing the regular operation of the securities markets (Stock Exchanges, futures and commodities exchanges, over-the-counter markets or organized over-the-counter markets) for the purpose of obtaining undue advantages or profits for oneself or others, or to cause damage to third parties is considered crime and the penalty is imprisonment of one (1) to eight (8) years and fine of up to three (3) times the amount of the undue advantage obtained as a result of the crime;
- Article 27-D provides that the use of relevant information not yet disclosed to the market, which one may know and which must remain confidential, so as to create undue advantages, for oneself or others, through the negotiation of securities, in one's behalf or on behalf of others is considered crime and the penalty is imprisonment of one (1) to five (5) years and fine of up to three (3) times the amount of the undue advantage obtained as a result of the crime.

Concerning Restricted Efforts Offers specifically, according to CVM Instruction 476/09:

- Article 10 of CVM Instruction 476/09, the securities offeror (issuer) shall provide true, consistent, correct and sufficient information for the investors; Such an obligation is extended to the managers of the offeror (issuer); and
- Article 11, the leader intermediary of the offer shall take all precautions and act with high standards of diligence, being liable for any lack of diligence or omission, in order to ensure that the information provided by the offeror (issuer) is true, consistent, correct and sufficient, allowing investors to ground their take decision
- Article 17, items VI and VII, the issuer shall (i) disclose on its page on the World Wide Web the occurrence of any material fact, as provided by CVM Instruction 358/02, informing immediately it to the leader intermediary of the offer; and (ii) provide information to the CVM whenever required.

B. Application of antifraud laws

The Securities Act provisions apply equally to public and hybrid offers.

In the case of hybrid offers, CVM Instruction 476/09 provisions are specifically applied to such offers. Securities issued under this regime are exempt from registration with the CVM, and as a general rule, there is *no need to issue a prospectus* (Article 5, item I) because such offers are targeted to QIB's. However, as mentioned above, the offeror, its managers and the lead intermediary shall provide accurate information to the investors in order to ground investors' decision making process.

C. Powers and role of the regulator

The CVM has the power to carry out only administrative enforcement actions related to fraud violations. Whenever an investigation concludes that a crime which merits public prosecution has occurred, in the terms of Article 12 of the Securities Law, the CVM shall notify the Public Prosecutor's Office in order to file a criminal suit.

In general, the CVM may:

- Carry out investigations (Securities Act, Article 9, item V);
- In order to prevent or correct abnormal market situations, suspend securities trading or declare the recess of a stock exchange (Securities Act, Article 9, paragraph 1);
- At its discretion, according to the public interest, suspend, at any moment, the administrative procedure opened in order to investigate illegal acts over the securities market legislation, if the defendant or accused signs a settlement instrument (consent decree) agreeing to: (i) refrain from the activities or acts regarded as illicit by CVM; and (ii) amend the irregularities, including offering compensation for losses (Securities Act, Article 11, paragraph 5);

- Impose administrative penalties (see below) on the violators of any provision of the Securities Law, the Corporation Law, or its resolutions, as well as any other legal provisions which are under the Securities Commission of Brazil responsibility to enforce (Securities Act, Article 11)

Concerning Restricted Efforts offers (“hybrid offers”), it is necessary for the CVM to first receive a complaint from a private party about a potential fraud violation before it becomes involved or starts an investigation, since restricted efforts offers are targeted (directed) exclusively to QIBs.

D. Types of sanctions

Article 11 of the Securities Act provides for **administrative penalties**, which include:

- Warning
- Fine
- Suspension of licenses to carry out certain market activities covered by the Securities Act
- Cancellation of authorization / licenses to carry out certain activities in securities and derivative markets.

Criminal sanctions (per Article 27, see section A above)

- Imprisonment of between 1 to 8 years
- Fine of up to 3 times the amount of the undue advantage obtained as a result of the crime.

2. India

A. Relevant antifraud laws and regulations

Any untrue statement and misstatement in the prospectus is in violation of the Companies Act, 2013 and will attract civil liabilities under Section 35 of this Act. Any untrue statement can also attract criminal liabilities under Section 34 and 229 of the Act. The said sections cast liability on the company, its directors, and promoters in case of violations. Under Section 23C of the Act, provisions relating to issuance of securities pertaining to companies intending to list their securities are delegated to SEBI.

Apart from the above, SEBI has powers under Section 11A of SEBI Act, 1992 to prescribe, by regulations among other things, the matters relating to issue of capital and listing of securities and specify the conditions subject to which the prospectus may be issued. SEBI has laid out detailed disclosure and other requirements for making public issuance of equity⁶² and for debt⁶³ securities. Violations of any of these regulations, will lead to action under the SEBI Act, 1992

⁶² SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009

⁶³ SEBI (Issue and Listing of Debt Securities) Regulations, 2008.

against the persons violating the requirements and SEBI can pass such directions as it deems fit in the interest of investors. Further, violations will also attract criminal liabilities under Section 24 of SEBI Act, 1992 against the persons violating such provisions.

B. Application of antifraud laws

Antifraud provisions referred to above apply equally to public offers and private placements. Even in case of private placements, the issuer is required to ensure that the disclosures specified in SEBI regulations are made.

C. Powers and role of the regulator

SEBI has powers to take administrative, civil, and criminal enforcement actions against any persons, who violate the regulations specified by SEBI.

SEBI has wide powers under SEBI Act, 1992 to enforce the regulations framed by it and the provisions of the Companies Act, 1956 that fall under its purview. SEBI has power to pass such directions as it thinks fit in the interest of investors, including directions for prohibiting persons violating SEBI Regulations from accessing the market and engaging in other activities, as deemed necessary, under Section 11, 11A and 11 (4) of the SEBI Act, 1992. SEBI can undertake inspection of any book, or register, or other document or record of a company and has the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while carrying out a lawsuit.

SEBI can also initiate an investigation in a matter under Section 11C of SEBI Act, where it has reasonable ground to believe that the transactions in securities are being dealt with in a manner detrimental to the investors or the securities market. Besides, SEBI can initiate prosecution proceedings against the persons for violating SEBI Regulations.

SEBI also has powers to settle cases outside courts through established consent mechanisms.

SEBI can start an investigation both on a suo motu basis, as well as based on information received through various channels, such as complaints, tips, stock exchange data / reports, media reports, etc.

SEBI can pass orders/directions (administrative or civil) without intervention of any court/judge because SEBI itself is a quasi-judicial authority. However, initiation of criminal proceedings can only be done through a court process.

SEBI has the following powers of a civil court:

- Discovery and production of books of account and other documents, at such place and time as may be specified by the Board;
- Summoning and enforcing the attendance of persons and examining them on oath;
- Inspection of any books, registers and other documents of any person referred to in section 12, at any place;

- Inspection of any book, or register, or other document or record of the company referred to in sub-section (2A);
- Issuing commissions for the examination of witnesses or documents

D. Types of sanctions

Under Section 11B of SEBI Act, 1992, SEBI can prevent the affairs of any intermediary being conducted in a manner detrimental to the interest of investors or securities market. Sanctions include, among others:

- Suspension of trading of any security in a recognized stock exchange;
- Prohibition of certain person from accessing the securities market
- Suspension of any office-bearer of any self-regulatory organization to hold such position.
- Freezing of proceeds or securities in respect of any transaction which is under investigation
- Prohibition from selling an asset forming part of any transaction that is under investigation
- Prohibition of any company to issue prospectus, any offer document, or advertisement soliciting money from the public for the issue of securities;
- Cease and desist orders requiring that a person/entity stop committing a certain violation
- Any measure as deemed fit by SEBI to protect the interest of the investing public.

3. Malaysia

A. Relevant antifraud laws and regulations

Section 15 of the Securities Commission Act 1993 (SCA) sets out the objectives and functions of the Securities Commission (SC) which gives it the power to promote and maintain market integrity, supervise and monitor market activities and market participants, and power to take enforcement action against illegal, improper practices and market misconduct.

Prohibited conduct involving securities is found in Capital Markets and Services Act 2007 (CMSA):

- Use of manipulative and deceptive devices – section 179;
- False or misleading statements/material omissions relating in prospectus – section 246

B. Application of antifraud laws

The antifraud laws and regulations apply equally to all offers of securities.

C. Powers and role of the regulator

The SC has specific powers to enforce the antifraud laws/regulations with a broad range of powers to investigate and prosecute securities offences. It is the sole regulatory authority having powers to carry out administrative, civil, and criminal enforcement actions for fraud violations with respect to securities offenses.

With respect to investigative and enforcement powers, the SC may:

- Appoint an Investigating Officer (IO) to carry out investigations for any securities offences (Section 125(1) SCA);
- Initiate administrative sanctions and civil actions (Sections 354 & 360 CMSA); and
- With consent of the Public Prosecutor, conduct criminal prosecutions against transgressors of securities laws (Section 136(1) SCA).
- An IO of the SC has powers under the SCA, including ability to:
 - Enter any place or building for the purpose of searching, taking possession and seizing any document, record, minute book or register that is relevant to securities offences and may be used as evidence (Section 128(1));
 - Require the production of any relevant document/books/registers etc (Section 128(5));
 - Require the surrender of any travel documents of persons subject to investigation (Section 132);
 - Require the presence of any person for the purpose of gathering oral evidence through the recording of their statement (Section 134); and
 - Arrest without warrant any person suspected to have committed securities offence (Section 141).

Under sections 128(7) and 134(5) of the SCA, it is a criminal offence when a person fails to co-operate with or obstructs an IO of the SC in respect of investigation of a securities offence.

The SC enforces compliance with the laws and regulations relating to securities activities through various administrative sanctions and initiation of civil and criminal proceedings against transgressors of securities laws. Securities fraud violations that attract civil and criminal enforcement actions involve the court process and are presided over by a judge. Administrative sanctions relating to securities fraud violations are handled directly by the SC. All administrative sanctions, material actions and decisions of the SC are subject to reviews as follows:

- Reviews of its own decisions pursuant to section 146 of the SCA and sections 364 and 365 of the CMSA; and
- Judicial review by the courts

The SC may commence an investigation into suspected fraud violation based on the following sources which include:

- Complaints, tip-off and/or information given by members of the public; and

- Referrals from the stock exchange, Bursa Malaysia, or other enforcement agencies which include the Royal Malaysian Police, the Central Bank and the Malaysian Anti-Corruption Commission.

D. Types of sanctions

Section 354 of the CMSA provides the SC with the power to impose administrative sanctions for breaches of the securities laws and guidelines. The sanctions that the SC may undertake include:

- Directive to comply with the relevant laws or guidelines;
- Fine or penalty not exceeding RM500,000;
- Reprimand; and
- Directive to remedy the breach or mitigate the effect of such breach including making restitution to person aggrieved by such breach.

Additionally, section 360 of the CMSA gives power to the SC to initiate civil action and seek a range of 16 types of injunctive/preventive/restitutionary court orders, which include:

- Order directing compliance with a directive issued by SC under section 354
- Order restraining or requiring the cessation of a contravention of securities laws
- Order requiring a person to comply with certain requirements under securities laws.

Finally, criminal sanctions under the CMSA are as follows:

Offence	Criminal sanction upon conviction
Use of manipulative and deceptive devices (Section 179)	Imprisonment not exceeding 10 years and fine not exceeding RM1,000,000 (section 182)
False or misleading statements/material omissions relating to prospectus (section 246)	Imprisonment not exceeding 10 years or fine not exceeding RM3,000,000 or both (section 246(3))

4. Thailand

A. Relevant antifraud laws and regulations

Below are the relevant sections of the SEC Act:

- **SECTION 76.** After the date on which the registration statement and draft prospectus have become effective, the SEC Office shall have the following powers:
 - (1) In cases where the SEC Office finds that the statements or particulars in the registration statement and prospectus are false or fail to disclose material facts that should have

been stated therein which may cause damage to the purchasers of securities, the SEC Office has the power to order the suspension of the effectiveness of the registration statement and draft prospectus, and in cases where the offer for sale of securities is given an approval in accordance with Section 32, Section 33 or Section 34, the SEC Office has the power to order the withdrawal of such approval immediately;

- (2) In cases where the SEC Office finds that the statements or particulars in the registration statement and prospectus contain material facts which are incorrect, or there is an event which causes a material change in the information contained in the registration statement and draft prospectus which may affect the investment-making decisions of the purchasers of securities, the SEC Office has the power to order the temporary suspension of the effectiveness of the registration statement and draft prospectus until a course of action has been taken to make a correction and other action is taken as specified by the SEC Office in order to make public the amendment of such information;
- (3) In cases where the SEC Office finds that the statements or particulars in the registration statement and prospectus are incorrect in other aspects, the SEC Office has the power to order the promoters of a public limited company, a company or owner of securities who files the said documents to make corrections.

The order of the SEC Office under the first paragraph does not affect any act of the promoters of a public limited company, a company or owner of securities undertaken prior to such order and does not affect the rights of any person as provided in Section 82 to claim for compensation.

- **SECTION 82.** In cases where the registration statement and prospectus contain false statements or particulars or fail to disclose material facts that should have been stated therein, any person who purchases securities from the promoters of a public limited company, a company or owner of securities, and such person is still the owner of such securities, who suffers damage from such purchase, shall have the right to claim compensation from the company or the owner of the securities.

The securities purchaser who has a right to claim compensation in accordance with the first paragraph must have purchased the securities before the facts under the first paragraph become apparent. However, the facts must become apparent within 1 year from the effective date of the registration statement and draft prospectus.

- **SECTION 83.** The following persons shall be liable in accordance with Section 82 jointly with the company or the owner of securities unless such persons can prove that they are not aware of the facts or by their positions they could not have been aware of the truthfulness of the information or the failure to disclose the facts required to be stated:

- (1) Directors who have the power to bind the company and signed their names in the registration statement and prospectus;
 - (2) Promoters of a public limited company who signed their names in the registration statement and prospectus;
 - (3) Underwriters, auditors, financial advisors, or appraisers of assets who intentionally or with gross negligence signed their names to certify the information in the registration statement and prospectus.
- **SECTION 278.** Any person who makes a false statement or conceals a fact which should have been stated in the registration statement or draft prospectus which has been filed in accordance with Section 65, in materiality, shall be liable to imprisonment for a term not exceeding 5 years and a fine not exceeding two times the price at which all securities were offered for sale by such person but not less than 500,000 Baht.
 - **SECTION 301.**⁴ In cases where a person who commits an offence under Section 278, Section 288 or Section 289 is a juristic person, the director, manager or any person responsible for the operation of such juristic person shall also be liable to the penalties as provided for such offences, unless it can be proven that such person has no involvement with the commission of offence by such juristic person.

B. Application of antifraud laws

The laws and regulations described in section A apply to both public offers (PO) and hybrid offers, which in Thailand is referred to as private placements for accredited investors, PP (AI). Both of these regimes require submission of a registration statement and prospectus to the SEC; for PP (AI) regime, these documents can be in short form.

The antifraud laws and regulations do not apply to the pure private placement regime referred as private placement with narrow distribution, which does not require submission of any registration statement or prospectus to the SEC.

C. Powers and role of the regulator

The SEC-Thailand has specific power to enforce the earlier mentioned laws. There are 3 procedures as follows:

Before selling debt securities:

- *Administrative procedure:* In case that the SEC finds out that there is fraud, misstatement of material information, or omission of material facts (“fraud violations”) on the registration statement & prospectus after the registration statement & prospectus have become effective but *before* the offering of debt securities, the SEC can take actions in accordance with Section 76 of the SEC act.

After selling debt securities:

- *Criminal procedure:* In case that the SEC finds out that there is fraud, misstatement of material information, or omission of material facts (“fraud violations”) on the registration statement & prospectus *after* the offering of debt securities, the SEC will file a complaint to the police officer/ an investigation officer to proceed with criminal action in accordance with Section 278 and Section 301 of the SEC act.
- *Civil procedure:* In case that there is fraud, misstatement of material information, or omission of material facts (“fraud violations”) on the registration statement & prospectus after the offering of debt securities, the investors can have the right to claim compensation from loss and damage from the company or persons that are reliable in accordance with Section 82 and Section 83 of the SEC act.

The SEC can start an investigation either upon receiving a complaint from a private party (e.g., an investor) or upon receiving a tip or becoming aware of information from other channels that warrants an investigation of a potential violation.

D. Types of sanctions

Administrative (before the sale of securities)

- Suspension of the effectiveness of the registration statement and draft prospectus (in cases of fraud)
- Order to withdraw approval of a securities offer (in cases of fraud)
- Temporary suspension of the effectiveness of the registration statement and draft prospectus until a course of action has been taken to make a correction (in cases of incorrect material facts)
- Order to make corrections (in case of other aspects of registration statement / prospectus being incorrect)

Criminal

- Imprisonment for a term not exceeding 5 years
- Fine not exceeding two times the price at which all securities were offered for sale but not less than 500,000 Baht.

5. United States

A. Relevant antifraud laws and regulations

In the US, any person / institution can be liable for fraud or negligence related to false or misleading statements or omissions of material facts related to a securities offering, including private placements (e.g., Rule 144A, Regulation S, etc.). The relevant regulations that apply to private placements in this regard are **Section 17** of the Securities Act of 1933 (“Securities Act”) and Section 10(b) of the Securities and Exchange Act of 1934 (“Exchange Act”) and **Rule 10b-5** thereunder.⁶⁴

Section 17 (a) of the Securities Act of 1933

It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement (as defined in section 3(a)(78) of the Securities Exchange Act) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly:

- (1) to employ any device, scheme or artifice to defraud, or
- (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
- (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Rule 10b-5 of the Securities and Exchange Act of 1934

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

- (a) To employ any device, scheme, or artifice to defraud,
- (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

⁶⁴ For public offerings, in addition to Section 17 and Rule 10b-5, Section 11 and 12 of the Securities Act are also applicable. Section 11(a) regulates untrue statements or omissions of material fact related to a *registration statement*, which is required for public offerings. It allows a person purchasing a security to recover damages from the issuer, its directors and officers who sign the registration statement, as well as underwriters involved in the securities offering. Section 12 specifies the use of a materially false or misleading *prospectus* or *oral statements* by an offeror or seller of securities, who can be liable to the person purchasing from him. *Source:* Wachtell, Lipton, Rosen & Katz. “Liabilities Under The Federal Securities Laws.” September 2011.

The main difference between Section 17(a)(2) and 17(a)(3), on the one hand, and Rule 10b-5, on the other, is that the latter requires **scienter** or proof of intent to “deceive, manipulate or defraud,” which can be more difficult to prove, whereas Section 17(a)(2) and (3) only require proof of **negligence** and focuses “upon the effect of particular conduct on members of the investing public, rather than upon the culpability of the person responsible.”^{65,66}

Section 17 protects only purchasers and operates only against sellers, whereas Rule 10b-5 can operate against both purchasers and sellers.

Rule 10b-5 is a general antifraud rule and the range of conduct it prohibits is broad. Most important violations of the rule could be classified into the following three categories:⁶⁷

- (1) Fraud in face-to-face transactions by sellers, purchasers, brokers and others;
- (2) False or misleading statements of material fact by corporate insiders or others that affect the prices at which securities trade;
- (3) Trading on material nonpublic information by corporate insiders and their tippees (“insider trading”).

With regards to material misstatements or omissions:

- Under Section 17(a)(2), liability can be imposed on anyone that *uses* a statement alleged to be materially false or misleading regardless of its source.
- Under Section 10b-5, liability can be imposed on anyone that *makes* a statement alleged to be materially false or misleading, which is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it.

Section 17 and Rule 10b-5 are **enforced by the SEC** in injunctive and civil penalty actions (pursuant to Section 20 of the Securities Act and Section 21(d) of the Exchange Act) and by **the Justice Department** in actions related to willful violations of the Exchange Act (pursuant to Section 32(a) of the Exchange Act).⁶⁸ Rule 10b-5 also provides for a **private right of action** (i.e., action by a private party to seek compensation for damages), whereas the scope for a private right of action under Section 17 remains unclear.⁶⁹

Statute of limitations (timeframe within which action can be brought against alleged violators) for both Section 17 and Rule 10b-5 is two years after the discovery of the facts constituting the violation and not later than five years after the occurrence of the violation.⁷⁰ In some cases, if SEC is working on settling a case outside of the courts, and the settlement is taking a long time

⁶⁵ Latham & Watkins. “District Court Ruling Paves the Way for More “Negligent Securities Fraud” Enforcement Actions Under Sections 17(a)(2) and (3) of the Securities Act.” July 2012.

⁶⁶ Section 17a(1) also technically requires scienter, but court cases have often concluded that anything that falls under 17a(1) could also be considered under 17a(2) and (3).

⁶⁷ Wachtell, Lipton, Rosen & Katz. “Liabilities Under The Federal Securities Laws.” September 2011.

⁶⁸ Idem

⁶⁹ Idem

⁷⁰ As established by the Sarbanes-Oxley Act of 2002.

and they are running the risk of reaching the maximum time specified in the statute of limitations, the SEC may require the violating party to sign a statement, which stops the statute of limitation from running. This is to ensure that SEC will still be able to prosecute the case in court if, for some reason, the settlement process fails.

B. Application of antifraud laws

As described above, Section 17 of the Securities Act and Rule 10b-5 of the Exchange Act apply to both public offers and private placements, whereas Section 11 and 12 of the Securities Act are only applicable to public offers.

C. Powers and role of the regulator

SEC has the powers to investigate fraud or negligence cases related to securities offers through private placements (including 144A issues) based on Section 17 and Rule 10b-5 described above. SEC can file suits in courts or undertake private investigations and handle cases outside of courts; however, the majority of the enforcement actions are handled in courts.

The main rationale behind SEC's broad powers in the enforcement of securities laws and regulations, including those related to private offerings, is the protection of the investing public broadly. That is, in a private party lawsuit, only financial compensation is sought and the violator may end up having to pay a large sum of money, if found guilty. However, with SEC's involvement, an injunction can be issued, ordering the violator to stop engaging in the activity or behavior that led to the violation. This also broadcasts to the public that a certain market participant has committed a violation and sends a message to the market that all future violators will be punished. Thus, if a private lawsuit is already underway, the SEC may also try to carry out its own investigation and enforcement procedure to issue an injunction or another administrative sanction in accordance to its investor protection mandate.

In general, an SEC investigation can be triggered through different ways and does not require a private party first initiating a lawsuit. This includes, for example, SEC receiving a tip (e.g., through its website) or SEC making observations or developing suspicions about a possible violation based on market information, company filings, etc.

The process of investigation and enforcement follows what is called a "Wells process." The SEC carries out its investigation, gathers all the evidence, and identifies all the violations. It then communicates to the party in question about the violations that the SEC is considering charging them with. The party has the option to supply additional information to clarify some issues and reduce violations. Once the investigation team finalizes the violations, it presents them to the Commission (consisting of 5 Commissioners), who then votes to decide whether to bring charges against the violators.

If the decision is affirmative, the Enforcement Division institutes the proceeding and also decides whether violations are of administrative, civil, or criminal nature. Depending on the latter, the SEC will either (i) follow an administrative action, whereby the case and its proceedings are

heard by an administrative law judge (ALJ), who is independent of the SEC; (ii) follow a civil action by filing a complaint with a US District Court; or (iii) pass the case off to the Department of Justice (DOJ) to follow a criminal action.

In addition to the above available actions, the SEC can also issue what is called a “21A Report” based on section 21A of the 1934 Act. This applies in cases when the Enforcement Division has carried out an investigation but, for some reason, the SEC has decided that it does not want to bring charges against the violators (e.g., there is lack of guidance, information may be interpreted in different ways, etc.). The 21A Report allows the SEC to recognize the behavior as a violation and let the market know that, in the future, it will bring charges against such violations.

Duties and Responsibilities of Intermediaries

Specific duties and responsibilities of various experts and intermediaries involved in a securities offer exist in connection to Section 11 of the Securities Act, which applies to violations related to *public* or *registered* offers of securities. For example, underwriters have a high duty to investigate the facts presented by the issuer to verify their validity. However, no similar responsibilities are detailed in relation to Section 17 and Rule 10b-5, which apply to private offers.

D. Types of sanctions

There are a variety of sanctions that can apply to violations under Section 17 or Rule 10b-5 enforceable by the SEC. The type of sanctions imposed and their severity depend on individual cases. They can include, among others:

- Injunctive orders to stop illegal conduct, such as cease and desist orders – the party receiving an injunction must disclose it publicly.
- Suspension or bar of securities professionals, e.g., barring individuals from associating with certain institutions, such as broker-dealers
- De-registration of institutions (e.g., broker-dealer)
- Stop orders
- Trading suspensions
- Asset freeze
- Freeze of stock options/bonuses of directors and officers pending investigation
- Disgorgement of illegal gains (includes requirement to pay back interest that may have been earned on the gains)
- Civil monetary penalties
- Criminal referrals – referrals to the DOJ for criminal investigations.

Civil monetary penalties

There are three tiers of penalties -- Tier 1, Tier 2, and Tier 3 with specific maximum amounts under each as follows:

- *Tier 1* – violations of the federal securities laws (non-fraud). For each violation, the penalty shall not exceed the greater of:
 - \$7,500 for a person or \$75,000 for an entity; OR
 - The gross amount of pecuniary gain to the defendant as a result of the violation
- *Tier 2* – If violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement. For each violation, the penalty shall not exceed the greater of:
 - \$75,000 for a person or \$375,000 for an entity; OR
 - The gross amount of pecuniary gain to the defendant as a result of the violation
- *Tier 3* – If violation involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; AND such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons. For each violation, the penalty shall not exceed the greater of:
 - \$150,000 for a person or \$725,000 for an entity; OR
 - The gross amount of pecuniary gain to the defendant as a result of the violation

Tier 3 is the tier that is used the most by the SEC.

Criminal Sanctions

“Willful” violations of securities laws can be prosecuted criminally and are handled by the DOJ. The SEC is authorized to share its files with the DOJ. If found guilty, sanctions could be as follows:

- Individuals: criminal fines up to \$5 million and prison up to 20 years for each separate violation
- Corporations: criminal fines up to \$25 million for each separate violation.

Sources and References

IOSCO Emerging Markets Committee. 2011. “Development of Corporate Bond Markets in the Emerging Markets.” November. Madrid.

Kelly-Dynega, Noreen, and Sarah Lightdale. 2012. “District Court Ruling Paves the Way for More ‘Negligent Securities Fraud’ Enforcement Actions under Sections 17(a)(2) and (3) of the Securities Act.” Client Alert, July. Latham & Watkins, New York.

McKinsey Global Institute. January 2013. “Infrastructure Productivity: How to Save \$1 Trillion a Year.” McKinsey & Company, Washington, DC.

Vizcarrondo, Paul, Jr. 2011. “Liabilities under the Federal Securities Laws.” September. Wachtell, Lipton, Rosen, and Katz, New York.

Surveys and interviews with the International Capital Market Association (ICMA), as well as the European Commission website and relevant laws and regulations, for information related to the European Union.

Websites and relevant laws and regulations of, as well as detailed surveys and interviews with the following securities regulators and self-regulatory organizations:

Brazil	Comissão de Valores Mobiliários, ANBIMA
Chile	Superintendencia de Valores y Seguros
India	Securities and Exchange Board of India
Israel	Israel Securities Authority
Malaysia	Securities Commission
Thailand	Securities and Exchange Commission
United States	Securities and Exchange Commission