

Dealing in the debt markets

Ricardo M Arango and Julianne Canavaggio of Arias Fábrega & Fábrega navigate through debt issuance

The capital market in Panama is primarily a debt one. As of March 31 2010, total debt issues on the Panama Stock Exchange (Bolsa de Valores de Panamá or BVP) reached an aggregate principal amount of \$3.3 billion. In contrast, equity issues reached an aggregate principal amount of \$514.6 million.

Of the total debt issues, bonds represented \$2.1 billion, mortgage-backed bonds \$197.3 million and corporate notes \$40 million. Agroindustrial notes represented \$40.5 million and treasury bills and notes accounted for \$515.6 million. Finally, tourism bonds made up \$14.7 million and commercial paper instruments totalled \$308 million.

The securities market in Panama is regulated by the National Securities Commission (Comisión Nacional de Valores or CNV), and the only authorised stock exchange is the BVP. Since its creation in 1990, the BVP has been an important part of the development of Panama's role as a regional financial centre. The exchange is the only dollar-based securities market in the region. Its operations are performed through qualified intermediaries (stockbrokers) who, with the BVP's prior authorisation, are entitled access to the floor when in session.

Transactions can be cleared exactly three

days after the transaction (T+3), or whenever the parties agree to deliver the funds, the securities, or both, at a future date, within the limits set by the rules and regulations of the BVP. This is notwithstanding the fact that the parties may decide to settle the operation before the expiration of the agreed term. Electronic trading began to replace the open outcry system in 2003, and the BVP now operates an electronic trading system with remote trading terminals for all BVP seatholders. In certain special circumstances where the electronic system fails, the BVP has adopted open outcry trading norms for use on the stock exchange floor with a physical presence of the participants.

Methods of raising debt finance

Debt securities are issued on the debt capital market in a number of ways. The most common forms are bonds and commercial paper.

Bonds

Bonds are debt instruments issued typically with a maturity of one year or more. They can be issued in a number of forms including: fixed rate; floating rate and variable rate bonds; zero coupon bonds; equity linked bonds; agro-industrial bonds; and corporate notes.

Commercial paper

Commercial paper is a debt instrument with a maturity of one year or less, which is registered with the CNV and subject to the registration, disclosure and ongoing requirements of the Securities Act.

Listing debt securities

An application for an offering of debt securities entails a registration of the securities with the CNV and, in most cases, also their admission to listing and trading on the BVP. To register a public offer of debt securities with the CNV, the issuer must file a registration statement with the CNV. The registration statement consists of two parts:

The prospectus, including financial statements. These must include:

- Audited financial statements for the past three fiscal years, issued by an independent public accountant, and prepared in compliance with US Gaap or International Financial Reporting Standards;
- Non-audited interim financial statements issued by a public accountant, for the quarter ending immediately before the date when the registration statement was filed with the CNV, if applicable;
- A comparison of the audited financial statements of the issuer for the past three fiscal years.

All other information required by the CNV, including:

- A sample of the security to be offered, including its terms and conditions.
- All material contracts related to the offering, including, any underwriting agreement, placement agent agreement and paying agency agreement.
- All material organisational and other corporate documents of the issuer material to the securities, including, articles of incorporation, by-laws and corporate resolutions authorising the issuance of the securities.
- CNV forms regarding disclosure on the corporate governance practices of the issuer.
- A legal opinion issued by the issuer's counsel.
- Other supporting documents, such as a certificate of existence and good standing of the issuer, affidavits regarding the independence of auditors and lawyers and powers of attorney.

When the issuer is a foreign person or company, additional requirements apply. For example, the issuer must appoint a legal representative with offices in Panama and with the capacity to represent the issuer

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Author biographies



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Ricardo M Arango joined the firm in 1987 and became a partner in 1995. He is a member of the firm's executive committee and operations committee. He is also head of the firm's capital markets and banking practice group. Arango's practice focuses on securities regulations, banking and finance, mergers, acquisitions and joint ventures, corporate and tax. In the area of capital markets and banking, Arango regularly advises clients in connection with medium term note programmes, commercial

paper programmes, syndicated term and revolving loan agreements, 144-A Reg-S notes, securitisations and initial public offerings. He has also acted as lead counsel in connection with the largest M&A transactions in the country and regularly advises clients in connection with stock purchase agreements, asset purchase agreements and merger agreements. He is fluent in Spanish and English.

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Listed among leading players identified by the top publication LatinLawyer 250 in its 2009 and 2010 editions, ARIFA associate Julianne Canavaggio received top reviews from clients and peers alike for its sustained achievements and was praised as "a rising star" and a lawyer "increasing in prominence". Canavaggio's practice focuses on mergers, acquisitions and joint ventures; corporations; banking and finance; and securities regulation. Prior to joining the firm, she worked as an

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before the CNV and to receive administrative and judicial notifications.

Considering that some of the officers and directors of the issuer, as well as the assets of the issuer, may be located outside of Panama, the issuer must also prepare a statement addressing how the rights of potential investors would be affected if they file claims for civil liability.

If a security interest is created on assets of the issuer, a legal opinion must be issued by an attorney authorised to practice law in the jurisdiction where the security interest has been created. The opinion must address the procedure for foreclosing on the security interest and any preferences or priorities affecting the security interest.

Foreign issuers must describe any relevant treaties that exist between the two countries or issue a statement that none exists and the CNV may order a due diligence investigation of the issuer. Finally, the issuer must file a certification issued by the competent foreign governmental authority stating that the foreign auditors who prepared the financial statements of the issuer are duly licensed in their jurisdiction.

All documents issued or executed outside of Panama must be authenticated by a Panamanian consul or under the 1961 Hague Convention Abolishing the Requirement of Legalisation of Foreign Public Documents. In addition, documents drafted in a language other than Spanish must be translated by an authorised public translator in Panama.

Documentation

If the debt issuance is to be traded on the BVP, an application for listing must be filed with the BVP and a listing agreement must be signed between the issuer and the BVP. The BVP has no size limit requirement on the total market value of securities to be listed, no minimum trading record requirement, and no minimum working capital requirement for companies seeking listing on the BVP.

The documentation and information submitted with the listing application is similar to the one filed with the CNV. The listing application with the BVP includes a copy of the prospectus and other material offering documents and information about the issuer. Any comments by the BVP to

any of the documents presented should be addressed before the CNV approves the offer and the final version of all documents. The BVP does not usually impose additional substantive requirements to those of the CNV, but it does conduct a similar review to that of the CNV in regard to information requirements.

If the securities will be traded on the BVP, an application for eligibility and deposit in custody of the securities must be filed with the authorised clearing house (LatinClear). A custodian and clearing agreement must be signed between the issuer and LatinClear.

The approval of a registration statement by the CNV usually takes between 45 and 60 days from the date of the initial filing. The CNV often makes comments on the documents presented within three weeks from the initial filing. Once all comments are properly addressed, the CNV takes an additional week or two to approve the offer.

Following approval from the CNV, the issuer deposits the securities with LatinClear, and completes its application for admission to trading with the BVP, which must include the CNV's resolution approving the public offer of the securities. Once the application is complete, admission to trading occurs followed by closing.

Marketing debt securities

Following the initial filing of its registration statement, the issuer may start marketing its public offer and building the book. Marketing efforts vary depending on whether they are carried out before, during or after the registration process with the CNV.

Pre-filing

Before a registration statement and a prospectus are filed with the CNV, the issuer can do very little marketing activity. Meetings can take place with, and information can be distributed to, underwriters or potential underwriters. However, during this period, the issuer cannot, without justification, carry out activities or disclose information in a manner that is not consistent with its past practices. These cannot be consistent with the ordinary course of its business, if carrying out these activities or disclosing this information may condition the market in anticipation of the public offering.

Registration period

Once a registration statement and a prospectus are filed with, and during the review process by, the CNV, the securities can be offered to potential investors by the

Timetable for an issuance

Below please find an indicative timetable for an offering of debt securities in Panama, where "T" is the date on which the securities are offered on the BVP.

T-4 months. Advisers are engaged, a basic term sheet for the offer is prepared, lawyers and accountants are hired, the company begins preparation for listing and any necessary corporate reorganisation is carried out.

T-3 months. Begin preparation of registration statement, prospectus, terms and conditions of the security and material transaction agreements.

T-2 months. File registration statement including preliminary prospectus with the CNV for review and comment.

Between T-8 weeks and T-4 weeks. CNV issues comments on the preliminary prospectus. Continue negotiation and drafting of final transaction agreements. Listing application is filed with BVP. Registration form is filed with LatinClear.

Between T-4 weeks and T-1 week. Re-filing of the prospectus with the CNV. File all material agreements and other supporting documentation in final form with the CNV. Obtain listing approval from the BVP and eligibility of the securities from LatinClear.

T-1 day. Price the offer. Execute underwriting agreement. File final underwriting agreement with CNV. Registration statement becomes effective.

T. Securities offered through the BVP.

T+2. Sales made through the BVP settle.

issuer, its placement agent or underwriters and non-binding purchase orders can be solicited from potential investors. However, each offer or solicitation must be made by delivering a copy of the preliminary prospectus filed with the CNV.

After registration statement becomes effective

After the registration statement becomes effective, the issuer, its placement agent and underwriters can publicly offer and sell the registered securities. All types of public advertisement can be made, provided that the marketing materials meet CNV regulatory requirements. Before purchase orders become final, an approved prospectus must be delivered to the investors.

Costs

There is a registration fee for public offers of securities of 0.015% of the initial price of the offer (or the total amount of the offer), with a minimum of \$500 and a maximum of \$50,000, payable to the CNV. Additionally, there is an annual supervisory fee equal to 0.01% of the outstanding number of debt securities, subject to a \$500 minimum and a \$15,000 maximum.

The BVP charges a \$250 fee for admission to trading of the first series of debt securities and a \$75 fee for assigning that series a registration number. Each additional series pays a \$50 admission-to-trading fee and a \$50 registration number fee. In addition, there are other commissions for trades charged by the BVP and the brokers making the trade on the BVP. Additionally, there is an annual supervisory fee equal to \$100 for the first series, and \$25 for each additional series.

Taxation

Taxation of interest

Interest payable on debt securities is exempt from income tax or withholding requirements in Panama, provided that the debt securities are both registered with the CNV and initially placed through a securities exchange or through an organised market in Panama. Please note that the only stock exchange authorised by the CNV is the BVP.

If the debt securities are registered with the CNV but they are not initially placed through the BVP, interest payments will be subject to a 5% income tax, which would have to be withheld by the issuer.

Taxation of dispositions

If the debt securities are registered with the CNV, any capital gains realised by a holder on the sale or other disposition is exempt from income tax in Panama, provided that the sale or disposition is made through a securities exchange or other organised market. The only stock exchange currently authorised by the CNV is the BVP.

If the debt securities are not sold through a securities exchange or other organised market:

- The seller is subject to income tax in Panama on capital gains realised on the sale of the debt securities, calculated at a fixed rate of 10%.
- The buyer must withhold from the seller an amount equal to 5% of the purchase price, as an advance in respect of the capital gains income tax payable by the seller, and it must pay it to the tax authorities within ten days of withholding.
- The seller can consider the amount withheld by the buyer as payment in full

of the seller's obligation to pay income tax on capital gains.

- If the amount withheld by the buyer is greater than the amount of capital gains income tax payable by the seller, the seller can recover the excess amount as a tax credit by filing a special sworn income tax declaration with the tax authorities.

Stamp and other taxes

If debt securities are registered with the CNV, neither the securities nor any transaction agreements related to the offering of such securities are subject to stamp taxes. There are no sales, transfer or inheritance taxes applicable to the sale or disposition of debt securities.

Foreign investors

A person domiciled outside of Panama is not required to file a tax return in Panama, solely by reason of his investment in debt securities registered in Panama, provided that gains realised on the sale and disposition of those debt securities are, in effect, exempt from income tax as indicated above.

Continuing obligations

All issuers of registered securities must comply with the continuing obligations set out in the securities laws as well as with applicable BVP rules.

Some of these continuing obligations include filing annual reports and quarterly reports, which discuss the issuer's financial and operating results, accompanied by audited financial statements for the respective period. Annual reports must be filed within three months from the end of the fiscal year and quarterly reports must be filed within two months from the end of each fiscal quarter.

Issuers must also put out immediate press releases of certain material events identified in the Securities Act. Reports of material events should be filed with the CNV and disclosed to the market within one business day from the occurrence of the event (when the event is deemed irreversible).

Issuers of registered securities are also subject to other provisions of the securities laws which prohibit:

- Entering into certain fraudulent or deceiving activities.
- The misuse of privileged information by insiders.
- The making of false or misleading statements of material facts.
- The manipulation of the price or the market of a security.
- The forging of any accounting or financial information.



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