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Welcome to the legal world of corporate finance!

What we will be talking about?

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"capital markets": markets where securities are bought and sold, usually overseen by some state authority.

"securities": negotiable instruments that can be easily traded on the capital markets, such as stocks and bonds (and their derivatives, such as futures contracts, options, or mutual funds).

“**Bonds**”: **securities** allowing holders to become creditors of the issuer (whether a company or a government), taking no ownership but enjoying the right to have their money paid back with interest.

Some typical bonds include:

- Straight fixed-rate bonds, having a designated maturity date, when principal is promised to be repaid.

Fixed coupon payments are paid to bondholders.

- Floating rate notes, medium-term bonds with coupon payments indexed to a reference rate

(like three-month or six-month US dollar LIBOR)

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- Convertible bonds allow the holder to exchange them for a pre-determined number of shares of the issuer.
- Bonds with equity warrants are straight fixed rate bond with a call option, entitling the holder to purchase shares at a pre-stated price over a predetermined time period.
- Zero-coupon bonds are sold at a discount from face value and do not pay interest over their life.
- Stripped bonds are zero-coupon bonds resulting from stripping coupons from a coupon bond, resulting in a series of zero coupon bonds.

- Dual currency bonds are straight fixed rate bonds issued in one currency and paying interest in such currency, but at maturity principal is repaid in a second currency.
- Composite currency bonds are straight fixed rate bonds denominated in a currency basket (SDRs, for example).

"Eurobonds": bonds denominated in a currency other than the home currency of the country or market in which they are issued. Frequently grouped together by the currency in which they are denominated: Eurodollar bonds, Euro yen bonds, etc.

"foreign bonds": bonds issued by a foreign borrower in the capital market of country X and denominated in country X's currency.

Eurobonds are highly flexible because issuers may choose the country of issuance based on the regulatory environment, interest rates and depth of such country's market.

Typically, they are issued in bearer form.

Dollar-denominated eurobonds make up over 80% of the international bond market:

The US dollar is the most “popular” bond currency;

Eurobonds are brought to market more quickly than bonds issued in the United States

(because not offered to US investors and require no registration)

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"Sovereign bonds" are bonds issued by a government or a governmental entity enjoying sovereign immunity (that is, they cannot be sued unless such immunity is waived)

The existence and scope of sovereign immunity is not determined by the laws of the sovereign but by those of the country where bonds are issued.

"Don't cry for me, Argentina…"

"Stocks" or shares represent a partial ownership interest in a company.
Governments do not issue shares.

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Shareholders are *owners*,
while bondholders are *creditors.*

Primary markets: where newly issued stocks or bonds are sold to investors, often through a process called "underwriting." This is a favorite means for governments and corporations to raise capital. These securities are often purchased by pension funds, hedge funds, sovereign wealth funds, and a few wealthy individuals and investment banks that trade on their own behalf.

Secondary markets negotiate existing securities that are re-sold and bought among investors or traders, either on an exchange market (usually regulated) or over-the-counter (unregulated).

The existence of secondary markets encourages investments in primary markets because investors may quickly liquidate their investments in the secondary markets and cash in should the need arise.

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What is the United States Securities Act of 1933?

"An act to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes".

In the United States, the 1933 Securities Act or “Truth in Securities Act” issued after the 1929 stock market crash and during the Great Depression mandates that any offer or sale of securities using the means and instrumentalities of interstate commerce **be registered with the SEC**, unless an exemption exists.

Since “means and instrumentalities of interstate commerce" is extremely broad, it is virtually impossible to avoid registration by attempting to offer or sell a security without using an "instrumentality" of interstate commerce.

The Truth in Securities Act attempts to ensure that investors receive accurate and sufficient information before they purchase any security. The Act adopts a “full disclosure philosophy”: it is possible to sell a bad security as long as all factual information is accurately disclosed.

Any issuer required to register under the 1933 Act must submit a registration statement, including a prospectus providing information about itself, its business, the particular security and its audited financial statements.

The company, the underwriter and all individuals (*includig lawyers*) who prepared the registration statement are liable for any inaccuracy. This extremely high level of liability exposure requires an enormous “due diligence” effort to ensure that all documents are complete and accurate.

Not all securities offerings must be registered.

Some exemptions include:

- private offerings to a specific type or limited number of persons or institutions;
- offerings of limited size;
- exemptions under SEC's Rule 144, permitting the public resale of restricted and controlled securities without registration.

Restrictions apply to the minimum length of time for which such securities must be held, the maximum volume permitted to be sold and the issuer's consent to future resales.

Registration exempt securities under Rule 144 sold during any subsequent 3-month period generally cannot exceed any of the following limitations:

- 1% of the stock outstanding;
- the average weekly trading volume in the securities on all national securities exchanges for the preceding 4 weeks;
- the average weekly trading volume reported through the NASDAQ consolidated transactions reporting system.
- A notice of resale must be filed if securities sold under Rule 144 in any 3-month period exceed 5,000 shares or if their aggregate sales price exceeds $50,000.

Rule 144A.

Rule 144A has become the principal safe harbor on which non-U.S. companies rely when accessing the U.S. capital markets because avoids registration requirements of the Securities Act.

Rule 144A applies to certain private resales of minimum $500,000 units of restricted securities to qualified institutional buyers (QIBs).

- QIBs generally are large institutional investors that own at least $100 million in investable assets.
- Offers to non-QIBs through general solicitations may be made following a 2012 amendment to the 144A rule.
- Rule 144A increased market liquidity, because institutions can now trade formerly restricted securities amongst themselves avoiding restrictions imposed to favor the public.
- Rule 144A promotes the sale of securities by foreign companies in the US capital markets.
- Companies registered with the SEC or foreign companies providing information to the SEC, do not need to provide their financial statements to buyers.

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Regulation S

- Another safe harbor which allows offerings of securities deemed to be executed outside of the United States not be subject to the registration requirement.
- Regulation S provides two safe harbors: an issuer safe harbor and a resale safe harbor.
- In both cases, Regulation S requires that offers and sales be made outside the United States and that no offering participant (which includes the issuer, the banks involved and their respective affiliates) engage in "directed selling efforts".
- If there is substantial U.S. market interest for the securities, Regulation S requires that no offers and sales be made to U.S. persons (including U.S. persons physically located outside the United States).

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What are US persons under Regulation S?

- Any natural person resident in the United States;
- Any partnership or corporation organized or incorporated under the laws of the United States;
- Any estate of which any executor or administrator is a U.S. person;
- Any trust of which any trustee is a U.S. person;
- Any agency or branch of a foreign entity located in the United States;
- Any non-discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit or account of a U.S. person;
- Any discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary organized, incorporated, or (if an individual) resident in the United States; and
- Any partnership or corporation if:
  - Organized or incorporated under the laws of any foreign jurisdiction; and
  - Formed by a U.S. person principally for the purpose of investing in securities not registered under the Act, unless it is organized or incorporated, and owned, by accredited investors (as defined in Rule 501(a)) who are not natural persons, estates or trusts.
- Section 902(k)(2) further defines some persons who are explicitly not U.S. persons.

Unlike other definitions of U.S. person, the Regulation S definition of U.S. person does not include U.S. citizens not resident in the U.S.

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Having said all this...

...What would be the role of the issuer's Zimbabewan legal advisor?

In the event a Zimbabwean issuer wishes to tap international capital markets, there will be many tasks to be performed for the issuer's domestic counsel.

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In general terms:

- Assisting in the selection between shares or bonds;
- Helping determine whether a foreign issue requires domestic registration (i.e., in Zimbabwe)
- Preparing the prospectus on all Zimbabwean legal matters (law and practice).
- Reviewing agreements between issuer and (i) investment bank; (ii) underwriters; (iii) paying agents; (iii) service of process agents, etc.

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Most important:

Providing the intervening banks with a sound, unqualified, clean legal opinion regarding the legality of the transaction and its compliance with all domestic legal requirements.

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Matters typically covered by a domestic legal opinion:

- May the issuer validly select a foreign law to govern the issuance?
- Does the issuer enjoy sovereign immunity?
- May it be validly waived?
- May the issuer validly submit to foreign jurisdiction?
- Will a foreign judgment be enforced in Zimbabwe?
- Under what requirements?
- Are there exchange controls in Zimbabwe that (a) may force the issuer to bring into the country the proceeds of the issuance or (b) prevent or complicate repayment?

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More questions to the issuer ‘s Zimbabwean lawyer:

- If the issuer is a state-owned entity, does it enjoy any particular benefits?
- Are there any public policy principles involved?
- What happens if issuer provides a public service?
- What would be the bondholders’ position in case of bankruptcy?
- What is the tax status of payments made by the issuer?
- Do withholdings apply?

Similar matters will have to be covered by Zimbabwean counsel to the banks involved

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Philip R Wood, QC, once wrote

The law is the one universal secular religion which everybody believes in, although they may differ, and usually do, about the scope and content of the codes of this religion. Unlike many other religions, belief in the law, the role of law and the rule of law, does not require a belief in the supernatural.

This religion does not require a showing of commitment to the codes in the form of rituals or attendance at churches or temples or in the form of other outward marks of identity.

This religion is not regional or local but is universal.

Because much law appears to be driven by emotion, and because its enforcement is sometimes pugnacious and bellicose, it is one of the primary tasks of lawyers to instil rationality, common-sense and a measured coolness, as well as tolerance.