II

AMBIF Bond and Note Issuance: Relevant Features in the Philippines

In addition to the market features corresponding to the AMBIF Elements, a number of general Philippine market features for AMBIF bond and note issuance to professional investors (Qualified Buyer) need to be considered, and are described in this chapter.

Governing Law and Jurisdiction

Governing law and the jurisdiction for specific service provisions in relation to a bond or note issuance may have some relevance in the context of AMBIF, since potential issuers may consider issuing under the laws or jurisdiction of a country or market other than the place of issuance. The choice of governing law or contractual preferences of stakeholders can affect the accessibility to a specific investor universe that may otherwise not be accessible if a bond or note was issued under the laws of the place of issuance. However, it is necessary to point out that provisions related to bond and note issuance and settlement must be governed by the laws and regulations of the place of issuance since AMBIF bonds and notes are domestic bonds and notes.

The civil code of the Philippines permits the use of governing laws or jurisdictions other than those in the Philippines in contracts, provided that such provisions do not contravene any existing Philippine laws.

Should the parties involved in a bond or note issuance choose to use Philippine law, the jurisdiction of the issuance would fall to Philippine courts by default. If, in contrast, issuance parties agree on another governing law, the parties would also have to specifically determine the jurisdiction of a court in which provisions of the bond or note issuance (e.g., settlement agency) could be enforced and any disputes would be heard and decided.

In the case of issuance of PHP-denominated bonds or notes in the Philippines, even in cases when contract parties choose a governing law other than Philippine law for the contract, it is expected that Philippine law would prevail as the law specific to issuance- and settlement-related matters.

In any case, the actual use of governing laws or jurisdictions other than those of the Philippines may be subject to clarification or legal advice from a qualified law firm, as may be necessary.

Language of Documentation and Disclosure Items

It is envisaged that most of the ASEAN+3 markets participating in AMBIF will be able to accept the use of a common document in English; however, some markets may require

the submission of approval-related information in their prescribed format and in the local language. In such cases, concessions from these regulatory authorities for a submission of required information in English, in addition to local language and formats, may be sought.

In the Philippines, English translation shall be used in all documentation with regard to the issuance of bonds or notes.

Credit Rating

Bonds and notes to be listed or enrolled on PDEx require a credit rating in line with the credit rating requirements stipulated by the SEC and BSP.

In its Memorandum Circular No. 7 released in March 2014, the SEC announced the Guidelines on the Accreditation, Operations and Reporting of Credit Rating Agencies, which govern the two domestic credit rating agencies, Philippine Rating Services (PhilRatings) and Credit Rating and Investors Services Philippines, in addition to an acceptance of international credit rating agencies.

Under BSP regulations, unsubordinated debt requires a rating of at least AA on the Philippine domestic credit rating scale. PhilRatings is the first domestic credit rating agency to be recognized by the BSP, based on minimum eligibility criteria for bank supervisory purposes. The BSP also accepts credit ratings from Fitch Ratings, Moody's, and Standard & Poor's, as well as Fitch Singapore. PDEx accepts credit ratings from a credit rating agency duly recognized by the applicable regulatory authorities.

Unrated bonds and notes are possible under present regulations and may be listed on the PDEx Qualified Board; however, it has been observed that potential AMBIF investors may prefer for bonds and notes to have a credit rating.

Selling and Transfer Restrictions

Selling and transfer restrictions for the issuance of bonds or notes to professional investors are well defined in the identified professional market segment in the Philippines (Qualified Buyers and Qualified Securities).

Pursuant to SRC Sections 9 and 10, the IRR published by the SEC prescribe a template and specific provisions on the use of that template, and define the selling and/or transfer restrictions when issuing bonds or notes to Qualified Buyers.

To further ensure that an exemption claimed by an issuer under Section 10.1 of the SRC when issuing bonds or notes aimed at Qualified Buyers, the SEC also looks to the underwriter—licensed by the SEC—to observe the applicable provisions and selling and transfer restrictions under the law.

In all offer documents and related correspondence to Qualified Buyers, including the term sheet of a proposed bond or note issue, an issuer must make explicit reference to SRC Section 10.1 (L) and give their commitment that said offer is limited to Qualified Buyers, thereby constituting an Exempt Transaction under the law. The IRR related to SRC Section 10.1 (1.c) prescribe the following statement in bold face and prominent type:

> The securities being offered or sold have not been registered with the Securities and Exchange Commission under the Securities Regulation Code, any future offer or sale thereof is subject to registration requirements under the Code unless such offer or sale qualifies as an Exempt Transaction.

In addition, appropriate selling or transfer restrictions will need to be printed on the actual issued instrument, typically global or jumbo certificate(s) in bold font if certificates are to be issued. However, Philippine company law does not require the physical issuance of certificates.

If a bond or note is listed or enrolled on PDEx, as discussed in Chapter I, the observance of applicable selling and transfer restrictions is part of the explicit warranties that issuers and participants give to PDEx when signing up. PDEx also requires all its listing or enrollments to be dematerialized; hence, no certificates means that no explicit selling restrictions will need to be printed.

There are no distinctions between domestic issuers and nonresident issuers with regard to selling or transfer restrictions and their observance.

Note Issuance Program

AMBIF promotes the use of note issuance programs, such as the medium-term note (MTN) format, because they not only give funding flexibility to issuers but also represent the most common format of bond and note issuance in the international bond market. This means that potential issuers, as well as investors and intermediaries, are likely to be familiar with note issuance programs and related practices. Hence, this would make AMBIF comparable to the relevant practices of the international bond market. At the same time, it is expected that potential issuers may benefit from reusing or adopting existing documentation or information on disclosure items.

At this stage, the issuance of PHP-denominated domestic bonds and notes to professional investors via an MTN program is not evident in the Philippine market. However, a listing or enrollment on PDEx, for example, would be possible as USD-denominated note issuance programs have been evident in the Philippines for some time. In addition, a shelf-registration concept exists, though this is not directly comparable to shelf-registration concepts typically practiced in other markets.

Private Placement

A typical definition of a private placement is the issuance of bonds or notes to professional investors under exemptions or concessions from full disclosure or defined regulatory processes. In this context, bonds or notes aimed at Qualified Buyers (QB bonds), or those classified as Exempt Transactions, typically fulfill the traditional expectations of a private placement concept in which the target group is professional investors and the issue is subject to exemption from full disclosure under applicable regulations and, in the case of the Philippines, registration with the SEC. Hence, QB bonds can be considered as being private

placements. The previous definition for private placement in regulations and market practice is no longer in use in the Philippines.[2]

Information and disclosure requirements for QB bonds and Exempt Transactions are defined in line with expectations from market participants on private placements. The IRR related to SRC Section 10.1(k), Subsection 4.d prescribe the Restrictions for Exempt Transactions—such as QB bonds—and require that the following information be provided to potential investors:

1. the exact name of the issuer and its predecessor, if any;
2. address of its principal executive offices;
3. place of incorporation;
4. exact title and class of the security;
5. par or stated value of the security;
6. number of shares or total amount of securities outstanding at the end of the issuer's most recent fiscal year;
7. name and address of the transfer agent;
8. nature of the issuer's business;
9. nature of products or services offered;
10. nature and extent of the issuer's facilities;
11. name of the chief executive officers and members of the board of directors;
12. issuer's most recent balance sheet and profit and loss and retained earnings statement for each of the preceding 2 fiscal years or such shorter period as the issuer (including its predecessor) has been in existence;
13. whether the person offering or selling the securities is affiliated, directly or indirectly, with the issuer;
14. whether the offering is being made directly or indirectly on behalf of the issuer, or any director, officer, or person who owns directly or indirectly more than 10% of the outstanding shares of any equity security of the issuer and, if so, the name of such person; and
15. information required under paragraph 1 of the relevant IRR.

In cases where the issuer is a reporting company under Section 17 of the SRC, a copy of its most recent annual report (SEC Form 17-A) may be used to provide any of the required information.

Facility Agent

Under the PDEx Listing Rules (7.3.8), debt securities to be listed or enrolled on PDEx must have a Facility Agent, or trustee. The issuer needs to appoint the Facility Agent. The duties of a Facility Agent follow for the most part the tasks normally associated with a bond trustee or

[2] Originally, the term "private placement" was only used in regulations and market practice in case of an issuance to a maximum number of 19 investors, regardless whether professional or not, owing to specific concessions existing for distributions to no more than this number of investors in the relevant tax regulations. Subsequently, market practice adopted the term "corporate notes" for such private placements. A 2012 Bureau of Internal Revenue ruling provided that issues with 19 investors or less are subject to a 20% creditable withholding tax. The SEC, in its revised IRR for the SRC introduced in early 2015, stopped using the term private placement.

bondholder representative. Key functions of the Facility Agent under the PDEx Listing Rules are as follows:

1. monitor the compliance by the issuer of all covenants of the issue;
2. act on behalf of the holders of securities in the event of any default of the issuer on any of the covenants; and
3. regularly report to the holders of the securities and to PDEx any of the following:
    a. any change, impairment, or removal of deposited collateral;
    b. acceleration of maturity of the issue;
    c. any call for redemption;
    d. noncompliance with sinking fund requirements, if any;
    e. noncompliance with any covenant or condition of the issuer;
    f. any event that will affect the obligations of the issuer under the issue; and
    g. any other action of the issuer or other event that comes to the knowledge of the Facility Agent that may impair or affect the value of the security or instrument.

Incentive for Longer-Tenured Issuances

Present tax regulations encourage the issuance of debt instruments with a tenure in excess of 5 years in order to achieve a favorable tax consideration for distributions from such debt instruments. In consequence, the market has adopted a practice of issuing bonds with a maturity of 5 years and at least 1 day to provide investors with this concession.