

Dentons Quick Guide

Debt Capital Markets Liability Management Alternatives

Grow | Protect | Operate | **Finance**

January 2023

Speed Read:

Issuers can undertake various actions to manage their outstanding bond liabilities (**liability management**):

A. Buying back bonds:

1. Open market repurchases/
bond buybacks
2. Tender offers

The type of liability management exercise that is right for an issuer will depend on what commercial objective it is trying to achieve (see the “Best Suited For” rows in this Quick Guide).

Depending on the liability management activity engaged in, issuers may need to be conscious of one or more of the following:

- their obligations under the UK and/or EU Market Abuse Regulation with regard to any inside information;
- their obligations to treat bondholders equally and not oppress the minority;
- how they propose to deal with their US bondholders and the potential application of US tender offer rules and/or the “new security” doctrine; and
- timing requirements, especially with regard to any meeting processes.

B. Changing the terms of the bonds through noteholder consent:

1. Written resolution
2. Electronic consent
3. Consent solicitation
4. Negative consent

A key point to remember when considering a liability management exercise is the anonymity of the beneficial holders of bonds in the clearing systems. Unless an issuer is aware of who their bondholders are, identification can prove costly and onerous (and sometimes impossible as it requires the holder to be proactive in identifying themselves).

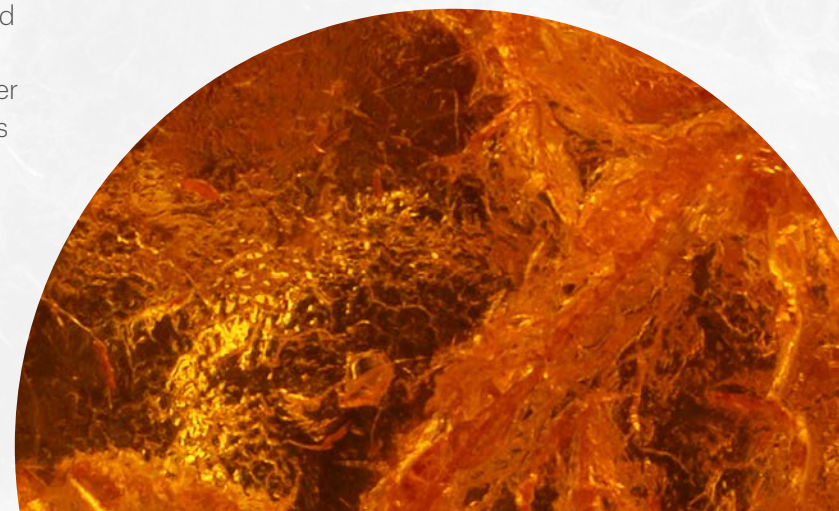
It is also worth noting that while bonds usually contain provisions for the Trustee to agree, without the consent of bondholders, to modifications that are (in its opinion) of a formal, minor or technical nature or to correct a manifest error, Trustees tend to take a conservative view and are rarely, if ever, willing to exercise this discretion without bondholder approval for any material modification. Some bonds without a Trustee may contain similar very limited provisions for the Fiscal Agent to make minor modifications to correct manifest or proven errors.

C. Refinancing:

1. Combining a new issue to fund a tender offer with an “exit consent” solicitation to insert changes to the terms of the existing bonds
2. Exchange offer

While not covered in this Quick Guide and not technically a liability management tool, should the terms of the bonds allow, the issuer may wish to exercise an available redemption feature (e.g. issuer call option) in the existing terms of the bonds which may or may not be funded by a simultaneous new issue.

Please speak to any of the Dentons contacts listed herein if you would like to discuss liability management options and considerations further.



A. Buying back bonds:

	1. Open market repurchase/bond buyback	2. Tender offer
What it is	Bank/broker is instructed to buy back bonds in the secondary market on behalf of issuer (usually unannounced).	Public offer to buy back bonds for cash.
Best suited for	<p>Issuer seeking to retire small amounts of bonds at low premium to secondary price levels.</p> <p>For these purposes a “small amount” means an amount which, given the bond’s liquidity and trading, is not expected to have a significant impact on the secondary market price. In practice, often limited to between 5% and 10% of the overall principal amount, but there is no bright-line test.</p> <p>Larger amounts may be repurchased subject to prior announcements, noting need to avoid “creeping tender offers”.</p> <p>For bonds trading below par, this can be an efficient use of issuer’s spare liquidity.</p> <p>Available where bond terms and conditions permit buybacks without prior notification or approval (this is usually the case).</p>	<p>Retirement of medium-large proportion of outstanding bond issue in short time frame in a highly visible manner.</p> <p>Can target multiple series on an “any and all” or “prioritised waterfall” basis.</p> <p>Can also be capped with participation prorated.</p> <p>Can also be combined with a new bond issue to fund the tender offer.</p>
Method	<p>Issuer instructs a bank/broker to make market purchases of bonds, usually within a set time period and set price parameters.</p> <p>Banks/broker will require mandate and representations that no price-sensitive information is held by the issuer.</p> <p>Banks/broker will also perform analysis of bond liquidity and maximum amount proposed to be purchased to be comfortable the buyback (without announcement) will not mislead the market.</p>	<p>Issuer (or another party) announces tender offer stating intention to buy back bonds within given time period (usually either modified Dutch auction or pre-specified spread or price).</p> <p>Tender offer memorandum.</p> <p>Dealer manager agreement.</p> <p>Tender agency agreement.</p> <p>Pricing announcement (if Dutch auction).</p> <p>Offer closes and tender results announced.</p>



1. Open market repurchase/bond buyback

Timing

Usually executed within a reporting period to maintain confidentiality. Information about the open market repurchase will usually be contained in issuer's next financial reporting.

2. Tender offer

While there is no minimum tender offer period in the UK, usually tenders in the UK are held open for a minimum of five business days, to allow time for the offer document to be sent to holders and to allow them to consider and respond.

If the offer is extended into the US, it must remain open for 20 business days (and a further 10 business days following a change in the tender price). However, an abbreviated five business day tender period may be available if the tender: (i) relates to non-convertible debt; (ii) consideration is cash (or Qualified Debt Securities¹) in a fixed amount or an amount based on a fixed spread to a benchmark; (iii) is open to all record and beneficial holders (or if Qualified Debt Securities are involved, only US QIBs and non-US persons); (iv) does not involve a covenant strip or exit consent; and (v) is not in anticipation of a change of control. Certain other criteria for the abbreviated five business day tender apply - please speak to the Dentons contacts overleaf for more information.

Settlement usually three business days after close of offer.

1. Qualified Debt Securities are non-convertible debt securities that are identical in all material respects to the bonds being tendered, except in respect of the maturity date, interest payment dates and record dates, redemption provisions and interest rate, provided that (i) all interest must be payable in cash; and (ii) such Qualified Debt Securities must have a weighted average life to maturity longer than the bonds subject to the tender offer.

1. Open market repurchase/bond buyback

Other points to note

Bonds are typically cancelled on repurchase, although an issuer needs to consider tax implications of repurchases/cancellation. Terms of the bonds should be checked as some state any bonds repurchased “shall” be cancelled, while others provide more flexibility.

UK/EU Market Abuse Regulation (**MAR**) obligations usually constrain size to small amounts of bond issue outstanding.

An issuer will need to monitor the process and progress of its bond repurchase plans and be mindful of its MAR requirements if the bonds are listed on a UK or European exchange to which MAR applies. While an issuer’s general intention to buy back its own bonds at the prevailing market price is not of itself inside information, once bonds have been bought back in an amount which would have a significant effect² on the price of the remaining bonds or related financial instruments, the issuer would possess inside information. The issuer would then need to release an announcement via a regulatory information service (**RIS**), disclosing the amount of bonds bought back, prior to conducting any further buybacks.

Need to avoid a “creeping tender” under US tender offer rules (i.e. where the nature or quantum of purchases is effectively a tender offer).

Additional considerations (including under US securities laws) apply for buybacks of convertible/exchangeable bonds.

2. Tender offer

Key for timing purposes is whether the tender is being extended into the US.

Tender offers can exclude US holders, but need to consider whether this is consistent with the commercial objectives, and whether this will be considered fair by noteholders. While there is no firm rule, it is often advisable to include US holders where more than 10% of target bonds are beneficially owned by US investors.

Where an “exit consent” solicitation is also involved, care must be taken that the terms of the proposed exit consent do not constitute oppression or intimidation of the minority (*Assenagon Asset Management SA v. Irish Bank Resolution Corporation Ltd* [2012] EWHC 2090 (Ch)).

Whether or not issuing into the US, issuers can also opt to include an “early bird” structure, whereby a cash incentive is offered to bondholders to encourage early participation in the tender offer which would result in two settlement dates (one after the early tender deadline and one after the final expiration of the offer).

2. Information which if made public would have a “significant effect on the price” of the securities means information which a reasonable investor would be likely to use as part of the basis for their investment decisions.

B. Changing the terms of the bonds through noteholder consent:

	1. Written resolution	2. Electronic consent	3. Consent solicitation	4. Negative consent
What it is	Bondholder approval to amend terms of a bond.	Bondholder approval to amend terms of a bond.	Public request for bondholder approval to amend terms of a bond.	Notification of the intention to amend the terms of a bond, subject to no objection from bondholders.
Best suited for	Where all (or nearly all) holders of bonds are known to the issuer and on board with the relevant amendments and/or bonds held by group members in certain issuance structures such as a wholly retained class in a securitisation.	Where all (or nearly all) holders of bonds are known to the issuer and on board with the relevant amendments.	<p>Amendment to terms or bond structure.</p> <p>Often implemented alongside a tender or exchange offer, as an “exit consent” to encourage non-participating holders to participate.</p> <p>May involve a consent fee and an “early bird” fee for early voting.</p> <p>Fees must be (i) reasonable and (ii) available to all holders on the same terms. Provided fully disclosed, an issuer may offer incentive fees such as an early bird consent fee (payable only to consenting holders who vote before an early voting deadline) and/or a consent fee (payable only to consenting holders who vote prior to the final deadline).</p>	Only available where provided for in the terms of the bonds. Usually only seen on securitisation structures with multiple classes of bonds to facilitate particular amendments (e.g. IBOR transition/reference rate change). Where included, the wording often follows the AFME model benchmark modification wording, and thus is limited in scope to situations of a change in the benchmark rate.

	1. Written resolution	2. Electronic consent	3. Consent solicitation	4. Negative consent
Method	<p>Amendments agreed with bondholders.</p> <p>Written resolution signed and evidence of holding provided.</p> <p>Supplemental trust deed/ agency agreement.</p>	<p>Amendments agreed with bondholders.</p> <p>Terms of the proposed resolution are provided to bondholders via the clearing system.</p> <p>Supplemental trust deed/ agency agreement.</p>	<p>Announce launch of consent solicitation.</p> <p>Consent solicitation memorandum.</p> <p>Consent solicitation agency agreement.</p> <p>Tabulation agency agreement.</p> <p>Notice of meeting.</p> <p>Noteholder meeting pack.</p> <p>Announce results of meeting – resolution must be passed at a quorate bondholder meeting.</p> <p>May need second meeting if quorum not reached.</p> <p>Supplemental trust deed/ agency agreement.</p>	<p>Notify bondholders of the proposed changes.</p> <p>Solicitation agency agreement.</p> <p>Tabulation agency agreement.</p> <p>Any required trustee certifications regarding the fact pattern and adhering to the relevant negative consent provisions.</p> <p>Notice of results.</p> <p>Relevant amendment agreements (supplemental trust deed/agency agreement etc.)</p>
Timing	No set timing.	No set timing.	<p>Required timing for English law governed bonds is set out in the terms of the bonds; usually 21 clear days' notice required prior to original meeting.</p> <p>14 clear days' notice in case of an adjourned meeting (measured from announcement).</p>	Bondholders usually have 30 calendar days from notification to object to the changes.

	1. Written resolution	2. Electronic consent	3. Consent solicitation	4. Negative consent
Other points to note	<p>For English law bonds (non-sovereign):</p> <ul style="list-style-type: none"> The threshold for a written resolution is usually high, often 90% of outstanding bonds. The bondholder will also need to provide evidence of holding, e.g. a snapshot of their/their custodian's holding and/or a certificate from their custodian/the relevant clearing system regarding ownership. Only available where provided for in the terms of the bonds (rare not to be provided for). 	<p>For English law bonds (non-sovereign):</p> <ul style="list-style-type: none"> The threshold for a written resolution is usually high, often 90% of outstanding bonds. There is no need for bondholders to provide evidence of holding as they will need to provide approval via the clearing systems, which is effective evidence. Only available where provided for in the terms of the bonds – as a relatively recent addition in bond documentation, this provision may not be included in the relevant bond documentation. 	<p>This is the method being used by issuers to amend LIBOR FRNs to SONIA FRNs governed by English law.</p> <p>No restriction on including US holders in the consent solicitation, provided the changes requested do not constitute a US offer of “new securities”. Changes that would typically constitute an offer of new securities include changing maturity date, coupon, currency or place of payment, or conversion provisions. Where the consent does constitute an offer of new securities, an issuer would need to consider available exemptions from US registration and US liability issues.</p> <p>For English law bonds (non-sovereign):</p> <ul style="list-style-type: none"> Changes become effective on signing of supplemental trust deed or agency agreement after the bondholder meeting. At the initial meeting, quorum requirements are usually 50% of outstanding bonds. For changes to certain fundamental terms such as payment dates or the amounts payable (“entrenched matters”/“reserved matters”), the quorum is usually increased to 75% of outstanding bonds. For the consent solicitation to be approved by bondholders, usual bondholder meeting provisions require that at least 75% of outstanding bonds in attendance at the meeting must vote in favour. 	<p>Not usually seen in plain eurobonds; reserved for more complex structures.</p> <p>If “No” votes are received from holders of the most senior class of bonds equal to usually at least 10% of the aggregate principal amount outstanding of such class then outstanding by the deadline, the issuer will not be entitled to make the relevant amendments without undertaking a full “positive” consent solicitation.</p> <p>No restriction on including US holders as the commonly held view is that non-objection does not qualify as an “investment decision” triggering the “new securities” concerns (see “Other Points to Note” in B3 (Consent Solicitation)).</p>

1. Written resolution**2. Electronic consent****3. Consent solicitation****4. Negative consent****Other
points
to note
(contd.)**

- On an adjourned meeting, the quorum requirement is usually reduced to those in attendance at the adjourned meeting (or between one quarter and one third of outstanding bonds for reserved matters). For the consent solicitation to be approved by bondholders, usual bondholder meeting provisions require that at least 75% of outstanding bonds attending the adjourned meeting must vote in favour.
- The power given to the majority bondholders via the consent solicitation to bind the minority bondholders must be exercised for the purpose of benefiting the class as a whole, and not merely individual bondholders only.

For NY law bonds (in particular high-yield bonds):

- Most consent solicitations require approval by at least a majority of holders of the outstanding principal amount of the bonds.
- Amendments of “money terms” usually require unanimous consent of holders of the outstanding principal amount of the bonds. This unanimity requirement means that consent solicitation is not being used as a tool to amend IBOR FRN New York law governed bonds.

C. Refinancing:

1. Combining a new issue to fund a tender offer with an “exit consent” solicitation to insert changes to the terms of the existing bonds		2. Exchange offer
What it is	A combination of a tender offer and a consent solicitation (see A2 (Tender Offer) and B3 (Consent Solicitation) above). The issuer combines a public request to repurchase bonds with a consent solicitation (often to insert a call option to retire the remaining bonds).	Public offer to retire existing bonds in exchange for new bond issue(s).
Best suited for	Adjusting debt maturity profile, amending terms. The new bonds may be allocated on a priority basis to existing bond investors who participate in the tender and exit consent.	<p>Adjusting debt maturity profile, amending terms, moving debt within the capital or corporate structure.</p> <p>Replace medium to large proportion of a bond issue, while retaining existing investors and not using issuer’s cash resources. As it does not involve the use of cash resources, it may be more attractive in a restructuring and insolvency process.</p> <p>As only offering to existing bond investors, participation rate may be lower than a combined tender and new issue.</p> <p>Sometimes combined with a new issuance where an issuer wishes to simultaneously raise cash and access new investors (for example, the new issue may be larger in size than the existing issue being exchanged).</p> <p>May also involve an “exit consent”.</p>

1. Combining a new issue to fund a tender offer with an “exit consent” solicitation to insert changes to the terms of the existing bonds

Method

Announce launch of tender offer and consent solicitation.

Offering circular in respect of the new bonds.

Tender offer and consent solicitation memorandum.

Dealer manager and solicitation agency agreement.

Trust deed/agency agreement in relation to new bonds (and related new issuance documentation).

Tabulation agency agreement.

Notice of meeting.

Noteholder meeting pack.

Announce results of meeting – resolution must be passed at a quorate bondholder meeting.

May need second meeting if quorum not reached.

Supplemental trust deed/agency agreement.

Close new issue, cancel tendered bonds and redeem remaining bonds.

2. Exchange offer

Issuer announces exchange offer.

Offering circular in respect of the new bonds.

Exchange offer memorandum.

Trust deed/agency agreement in relation to new bonds (and related new issue documentation).

Tabulation agency agreement.

Announce exchange offer results.

Close new issue and cancel exchanged bonds.

1. Combining a new issue to fund a tender offer with an “exit consent” solicitation to insert changes to the terms of the existing bonds

Timing

The timings for each of A2 (Tender Offer) and B3 (Consent Solicitation) above.

If launched with a new issue, there are further timing and settlement implications. An “early bird” structure is often used to ascertain participation early on in the process (noting the extension of the tender offer timetable as a result of the consent solicitation element).

Other points to note

Considerations for including US investors apply as per A2 (Tender Offer) and B3 (Consent Solicitation) above. It is possible for the tender offer to only be open to non-US investors while the consent solicitation is open to all holders of bonds. The insertion of a call option does not generally constitute a US offer of “new securities”.

Usually undertaken in close proximity to a call date and/or maturity and priced accordingly to assuage *Assenagon* “oppression of the minority” issues while at the same time promoting efficient refinancing for the issuer.

2. Exchange offer

If addressed to US holders, same timing requirements as for US tender offers apply (i.e. minimum 20 business days). However, not eligible for US tender offer accelerated five business days timetable.

In addition, if the new bonds are to be a new standalone issuance rather than off an existing programme drawdown, preparation time will be significant prior to initial announcement.

Offer may be extended to US holders on a private placement basis (principally, to qualified institutional buyers – the same investors as in a Rule 144A bond offering).

Considerations for including US investors similar to a tender offer.

As an alternative to an exchange offer, a scheme of arrangement may be considered (effectively forces the restructuring on dissenting creditors), but it is time-consuming, expensive and requires English court sanction.

Consider *Assenagon* “oppression of the minority” issues if “exit consent” is involved.

For representative experience, please do reach out to one of the team below.

Contacts



David Cohen
Partner, London
D +44 20 7246 7535
david.cohen@dentons.com



Nick Hayday
Partner, London
D +44 20 7246 7516
nick.hayday@dentons.com



Neil Dixon
Partner, London
D +44 20 7246 7522
neil.dixon@dentons.com



Cameron Half
Partner, Capital Markets
and US Securities Laws,
London
D +44 20 7246 7175
cameron.half@dentons.com



Alex Roussos
Partner, Dubai
D +971 4 402 0895
alex.roussos@dentons.com



Victoria Wyer
Partner, London
D +44 20 7320 6340
victoria.wyer@dentons.com



Brian O'Leary
Senior Associate, Dublin
D +44 20 7246 7499
brian.oleary@dentons.com



James Osun-Sanmi
Senior Associate, Dubai
D +971 4 402 0929
james.osun-sanmi@dentons.com



David Ferris
Managing Practice Development
Lawyer, London
D +44 20 7320 6353
david.ferris@dentons.com

This note is written in the context of liability management in relation to DCM bond issues in the European market, where such bonds were issued under an exemption to the registration requirements of the US Securities Act of 1933 (as amended), on either a Regulation S or a Rule 144A/Regulation S basis. It is a high-level overview of a complex topic, intended to provide a general overview of the issues. Prior to taking any specific actions, the particular factual circumstances of an individual liability management exercise and issuer should be considered and specific legal advice sought.

ABOUT DENTONS

Dentons is designed to be different. As the world's largest global law firm with 21,000 professionals in over 200 locations in more than 80 countries, we can help you grow, protect, operate and finance your business. Our polycentric and purpose-driven approach, together with our commitment to inclusion, diversity, equity and ESG, ensures we challenge the status quo to stay focused on what matters most to you.

www.dentons.com

© 2023 Dentons. Dentons is a global legal practice providing client services worldwide through its member firms and affiliates. This publication is not designed to provide legal or other advice and you should not take, or refrain from taking, action based on its content. Please see [dentons.com](https://www.dentons.com) for Legal Notices.