Debevoise & Plimpton

Debevoise In Depth

An Insight Into Debt Liability Management Exercises of Non-U.S. Issuers

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Buying back outstanding debt securities or exchanging them for newly issued debt is often a cost-effective form of liability management for issuers, particularly when interest rates are falling.

Offers to purchase outstanding bonds (for cash or other debt securities) present a number of structural and legal complexities, including those relating to U.S. securities laws (irrespective of the domicile of the issuer). In this Debevoise In Depth, we will focus on the key legal and practical considerations for issuers in connection with debt buybacks.[1]

Restrictions Under Debt Documentation

When considering a debt buyback, an issuer, in the first instance, should confirm that such transaction is permitted under the terms and conditions of the bonds to be purchased, as well as the agreements governing the terms of any other debt of the issuer and its group. In particular, any debt buyback is likely to implicate "restricted payment" or similar covenants in the agreements governing an issuer's debt facilities, which is commonly the case for non-investment-grade issuers.

If a buyback of the debt securities in question is permitted, an issuer should also consider whether the terms and conditions of the bonds require that the bonds be cancelled by the issuer or permit the bonds to be held in treasury following their buyback. Debt securities repurchased by the issuer and held in treasury are typically treated as not outstanding and would not be included in the calculation of "outstanding" debt for consent solicitation purposes. An issuer's debt documents may also impose

1 For purposes of this Debevoise In Depth, the term "debt buyback" will refer to any offer to acquire bonds and other debt securities, for cash or other consideration (including other debt securities) not pursuant to pre-existing contractual redemption or repurchase rights, and the term "issuer" will refer to the issuer of the debt securities to be purchased or any affiliate conducting the purchase on its behalf.

obligations to treat all bondholders equally and, therefore, require any offer to be open to all (rather than only to certain) bondholders.

U.S. Securities Law Considerations

In conjunction with an evaluation of the appropriate buyback structure, it is critical that an issuer ascertain at the outset whether U.S. securities laws applicable to tender offers would apply and whether the debt is held by U.S. residents.

The U.S. securities laws do not define the term "tender offer." However, the following eight factors must be considered to determine whether a proposed buyback would constitute a tender offer for U.S. securities law purposes:[2]

- there is active and widespread solicitation of public security holders;
- there is solicitation to purchase a substantial percentage of the securities;
- the offer is to purchase the securities at a premium over the prevailing market price;
- the terms of the offer are firm rather than negotiable;
- the offer is contingent on the tender of a fixed minimum number of securities;
- the offer is open for only a limited period of time;
- the offerees are pressured to sell; and
- the public announcement of the purchasing program precedes or accompanies a rapid accumulation of securities.

While no single factor is determinative, the existence of any of the above factors could indicate that a buyback constitutes a tender offer for U.S. securities law purposes. In addition, it is important to take into consideration whether the same debt securities are or were subject to other repurchase programs and open market repurchases. While such repurchases may not, on their own, constitute a tender offer, there is a risk that if they are followed within a short period of time by a tender offer at a premium over the market price, such repurchases would be deemed to constitute part of the tender offer. For these reasons, it is generally advisable to impose a cooling-off period between the

[2] See *Wellman v. Dickinson,* 475 F. Supp. 783 (SDNY 1979), aff'd, 682 F.2d 355 (2d Cir. 1982), cert. denied. 460 U.S. 1069 (1985).

cessation of open market repurchases and/or repurchase programs and the commencement of a debt tender offer. We recommend seeking legal advice on whether a cooling-off period is required and if so, on the length of such period.

To the extent that a debt buyback qualifies as a "tender offer" for U.S. securities law purposes under the above eight factors, the transaction will be subject to Section 14(e) of the U.S. Securities Exchange Act of 1934, as amended (the "Exchange Act"), and Regulation 14E under the Exchange Act, in addition to the laws and regulations applicable to domicile of the issuer.

Regulation 14E for Foreign Private Issuers

All tender offers in the U.S., including tender offers by foreign private issuers ("FPIs")[3] with no securities registered in the United States, are subject to Regulation 14E. Regulation 14E does not itself contain specific requirements for what must be disclosed in the tender offer memorandum made available to investors. However, offerors are subject to the general anti-fraud requirement of Rule 14e-3 under the Exchange Act, as well as Rule 10b-5 under the Exchange Act, which require the offeror to disclose all information to investors that may be material to their decision to sell their securities.

The minimum requirements of Regulation 14E include the following:

- the tender offer be open for no less than 20 U.S. business days from the date the tender offer is first published or sent to security holders, and no less than an additional 10 U.S. business days if there is an increase or decrease in the percentage of securities being sought, or the consideration offered or the dealer's soliciting fee is changed;

- prompt payment;

- notice upon extension of the offer period; and

- restrictions on transactions on the basis of material, non-public information ("MNPI").

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[3] For U.S. securities law purposes, a "foreign private issuer" is an issuer domiciled outside of the United States that has 50% or less of its outstanding voting securities held directly or indirectly by U.S. residents or, if more than 50% of its outstanding voting securities are held directly or indirectly by U.S. residents, (i) less than a majority of its executive officers or directors are U.S. citizens or residents, (ii) 50% or less of the issuer's assets are located in the United States and (iii) the issuer's business is administered principally outside of the United States.

While Regulation 14E does not provide a specific safe harbor for avoiding U.S. jurisdiction, the U.S. Securities and Exchange Commission (the "SEC") has provided limited guidance on excluding U.S. holders from a tender offer. However, even if the issuer takes all precautionary steps to exclude U.S. holders, the risk that the SEC would deem the offer to be made inside the United States cannot be entirely excluded. Such precautionary steps would include the following:

- legends and internet website restrictions to keep U.S. holders from accessing information on the debt buyback (but not enough on their own);
- no tender documentation to be sent to holders with U.S. addresses;
- procedures to prohibit acceptance of tenders from within the United States and payments being made in the United States;
- certifications that holders are not tendering from the United States; and
- no press activity or releases inside the United States.

When considering excluding U.S. holders from a buyback, an issuer should consider whether the commercial objectives could still be achieved, which will likely depend on the number of U.S. holders. It is important to have U.S. securities law counsel involved, even if U.S. holders are to be excluded, to make sure that all the necessary precautions are taken in connection with the exclusion of U.S. holders.

Exemptions from Regulation 14E for FPIs

FPIs may be exempt from certain requirements of Regulation 14E in connection with debt buybacks, depending on the percentage of bonds beneficially owned by U.S. residents. In determining such percentage, the issuer is required to "look through" securities held of record by nominees in (i) the United States, (ii) the issuer's home jurisdiction and (iii) the principal trading market of the bonds in order to identify those held for the accounts of persons located in the United States. The calculation must be made no more than 60 days before and no later than 30 days after public announcement of the tender offer and exclude securities held by the issuer and convertible or exchangeable securities, such as options.

If the issuer, after "reasonable inquiry," is unable to calculate the percentage of its debt securities beneficially owned by U.S. residents, it may assume that the relevant holders of the debt securities are residents of the jurisdiction in which the nominee has its principal place of business.

Tier I
If 10% or less of the class of securities subject to the tender offer is beneficially owned by "U.S. persons," a tender offer by an FPI is exempt from *most* of the requirements of Regulation 14E pursuant to the "Tier I" exemption. Additionally, an FPI qualifying for a Tier I exemption is also not required to file any tender offer documents on Schedule TO with the SEC.

Even if the issuer qualifies for the Tier I exemption, it:

- must distribute to U.S. holders (in English) of such securities the material distributed to holders in the issuer's home jurisdiction;
- must provide U.S. holders the right to participate on terms at least as favorable as those offered to non-U.S. holders; and
- is subject to general Rule 10b-5 anti-fraud considerations, including potential liability for material misstatements or omissions in the tender offer documents.

Tier II
If 40% or less of the class of securities subject to the tender offer is beneficially owned by "U.S. persons," a tender offer by an FPI is exempt from only *certain* of the requirements of Regulation 14E pursuant to the "Tier II" exemption. An FPI qualifying for the Tier II exemption is not required to file any debt tender offer documents on Schedule TO with the SEC. Under the Tier II exemption:

- the tender offer must be open for at least 20 U.S. business days, plus an additional 10 U.S. business days if there is an increase or decrease in the percentage of securities being sought or if the consideration offered or the dealer's soliciting fee is changed;
- the issuer may waive or reduce the minimum acceptance condition in the offer without providing withdrawal rights if, among other things, the possibility of such a waiver is stated in the initial offering materials, an announcement is made five days prior to such waiver or reduction and withdrawal rights are provided during those five days; and
- if the duration of the offer is extended, the issuer must provide notice of such extension in accordance with the requirements of the home jurisdiction law or practice.

Tender Offer Structures

In evaluating available tender offer structures, in addition to its commercial objectives, an issuer must take in account the composition of its bondholder base and the application of the restrictions under U.S. securities law discussed above.

Fixed Price Tender Offer

In a fixed price tender offer, the offeror offers to repurchase all or a portion of the outstanding debt securities at a predetermined price. Fixed price tender offers are typically used when an offeror has sufficient liquidity.

Fixed price tender offers are typically executed with a premium to the nominal amount of the bonds (for example, an offeror buys each $1,000 of bonds for $1,010). Fixed price tender offers can be executed to repurchase a portion of the outstanding bonds or any and all bonds of a specific series, depending on the issuer's liability management objectives. "Any-and-all" tender offers may also include a consent solicitation process in the case where the issuer wishes to remove or disapply certain covenants applicable to the bonds or obtain a squeeze-out consent. A consent solicitation conducted alongside a tender offer could incentivize holders to sell their securities in the tender offer to avoid holding debt securities that contain significantly fewer protections than when initially issued.

Fixed Spread Tender Offer

In a fixed spread tender offer, the purchase price is determined on the basis of a fixed spread over a reference yield (such as government-issued securities of a similar maturity). The offeror can determine such price either each day for the bonds tendered on that day (as long as such methodologies used to calculate the purchase price, indicating the benchmark security to be used and the reference source used to establish the yield of the benchmark security, are sufficiently disclosed in the tender offer memorandum) or on a specific day prior to the termination of the tender offer.

Modified Dutch Auction

In a modified Dutch auction, the offeror sets a price range. Bondholders then submit offers to sell their bonds within this range, and the offeror selects the lowest price at which it will purchase the bonds. This method allows the offeror to potentially buy back debt at a lower price while giving bondholders some flexibility in setting their selling price. The modified Dutch auction can result in a more cost-effective buyback for the issuer compared to fixed price tender offers described above.

Unmodified Dutch Auction

In an unmodified Dutch auction, bondholders submit offers to sell their debt at any price they choose. The offeror then accepts the lowest priced offers first until it has purchased the targeted amount of debt. However, an offer cannot be structured as an unmodified Dutch auction if the buyback is open to U.S. holders of the relevant debt securities.

"Early Bird" Specials

An "early bird" premium may be offered to holders who tender early, usually within 10 business days of the commencement of the tender offer. Such premiums can encourage early participation and provide certainty for the offeror. However, early bird premiums are not available for buybacks of convertible or exchangeable debt securities.

Abbreviated Five-Day Tender Offers

U.S. rules also permit issuers, including FPIs (regardless of whether they qualify for Tier I or Tier II exemptions), to conduct "abbreviated tender offers" for debt securities open for just five business days in certain circumstances. Such offers must follow specific SEC guidance, including the following:

- the issuer, a subsidiary or the parent of the issuer must be conducting the tender offer (i.e., third-party tender offers are not permitted);
- the debt securities must not be convertible into equity;
- the tender offer must be "any and all"—it is not permitted to buy back only a portion of the class of outstanding debt securities;
- the tender offer must not be made simultaneously with a consent solicitation process to amend the terms and conditions of the bonds or any M&A, restructuring or extraordinary transactions;
- the tender offer must be open to all holders of the debt securities—it is not permitted to exclude U.S. holders;
- consideration for the debt securities must be paid either in a fixed amount of cash or "qualified debt securities" (non-convertible debt securities that are substantially similar to the debt securities subject to the abbreviated tender offer) or a fixed spread-based amount of cash or "qualified debt securities"—Dutch auction procedures for the price determination are not permitted;
- the issuer must immediately make a widespread dissemination of the offer documents, typically by making them available on its website;
- the issuer cannot use "senior" debt to finance the tender offer;

- there are no disqualifying proceedings, facts or circumstances set out by the SEC that would make the abbreviated tender offer, in the SEC's opinion, not possible, including bankruptcy, debt defaults and change of control events; and

- the tender offer must provide for withdrawal rights that are exercisable (i) at least until the earlier of (x) the expiration date of the offer and (y) the 10th business day after commencement of the offer if the offer is extended and (ii) at any time after the 60th business day after commencement if the offer has not been consummated by that day for any reason.

Disclosure Considerations

Tender offers by FPIs that qualify under either the Tier I or Tier II exemption are not subject to specific disclosure requirements under U.S. securities laws if the company is not listed in the United States. However, it is customary that a tender offer memorandum, including disclosure about the terms of, rationale for and key risks regarding the tender offer, as well as information about the issuer, is disseminated to bondholders.

In addition to information on the offer itself, an issuer may not commence and conduct a debt buyback while in possession of MNPI, such as unpublished financial results or an unannounced material acquisition or disposition transaction. Additionally, the buyback itself could constitute MNPI and would need to be disclosed prior to its commencement. Issuers, therefore, often disclose potential buybacks in their ongoing regular reports made available to bondholders prior to the commencement of any repurchase activity.

Issuers of debt securities subject to the EU or UK Market Abuse Regulation ("MAR") have similar restrictions when engaging in the debt buyback exercise. Among others:

- all "inside information" must be publicly disclosed at the commencement and during the course of the buyback, and the buyback itself would likely be considered "inside information" for MAR purposes; and

- an issuer may wish to follow, as best practice, a blackout period (30 days before the release of financial statements) and not commence a tender offer in such period, although the "safe harbor" rules for buybacks under MAR are not applicable to debt securities.

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Please do not hesitate to contact us with any questions.

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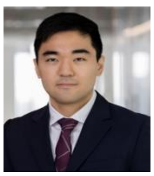

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