

LIABILITY MANAGEMENT IN VOLATILE MARKETS: TO TENDER OR REPURCHASE IN THE OPEN MARKET?

Global economic and wider conditions have resulted in severe market dislocation globally, and the international debt capital markets are no exception. While bond issuers who are suffering from cash flow constraints have looked to liability management – and the consent solicitation process – to relieve stress on their balance sheets and their financial covenants, others have looked to opportunities brought about by the market dislocation to reconfigure their balance sheets by buying back, and thus retiring, outstanding bonds that are trading at price levels below the par value of the bonds. In particular, the demand by bond funds for liquidity in order to meet fund redemption obligations during times of economic distress serves to exacerbate the downward pressure on bond prices.

In addition to optimising its balance sheet, a successful repurchase of outstanding bonds trading below par may also result in an issuer being permitted to recognise a profit (being the difference between the par value and the repurchase price paid), and if the repurchase is refinanced with other debt (for example, in the loan market), may also be able to reduce their overall cost of debt capital.

Issuers can repurchase their bonds, and thus retire that component of debt, either through open market repurchases or by conducting a public tender offer to all bondholders. An open market repurchase is typically an opportunistic repurchase of some, but not all, outstanding bonds in the open market, and at prices that are privately negotiated. A tender offer, on the other hand, is a public offer made by the issuer to all bondholders of the given series of bonds to repurchase all or a proportion of the outstanding amount of the bonds, and at a price that is applicable to all holders who accept the tender.

Unlike tender offers, open market repurchases are typically privately negotiated trades and executed between two dealers: one mandated by the issuer to conduct the open market repurchases, and the other executing trades on the seller's behalf. As such, sellers of bonds in the secondary market will not typically be aware that the issuer is repurchasing its debt. Empirical economic studies have shown that in times of economic stress, this could have an advantageous effect on the price at which the issuer can repurchase the bonds, as the premium demanded by bondholders will be less than would be the case in a public tender offer, where sellers have a higher degree of confidence in the issuer's ability to service its debt. However, while economically advantageous, various anti-fraud rules and regulations have developed within the body of international securities laws in order to prevent such information asymmetry between an issuer and a buyer, and thus to ensure a level playing field. Accordingly, issuers will need to carefully balance

Key issues

- Market dislocation in global capital markets may provide issuers with opportunities to reconfigure their balance sheets by repurchasing outstanding bonds trading below their par value.
- Issuers can choose between open market repurchases or public tender offers to retire bonds prior to their maturity or call dates, each of which have a different economic, regulatory and legal risk profile for issuers to consider.
- This briefing compares the key differences between open market repurchases and tender offers, considering issues surrounding suitability; publicity; pricing mechanisms; disclosure, anti-fraud and insider trading regulations; documentation; execution timing; stock exchange announcements; U.S. tender offer rules; the impact on existing covenants and equal-treatment issues and the terms of the bonds being repurchased.

the legal and compliance risks with any economic advantages in choosing the appropriate repurchase method.

The table below sets out a summary of the key differences in execution and legal risks between open market repurchases and tender offers, which may be helpful to issuers and their advisers when selecting the appropriate method and structure for their repurchase transaction. This briefing is intended to be a companion to the Clifford Chance [Liability Management: Key Considerations for Debt Issuers in Asia-Pacific, 2nd Edition](#), which provides more detailed commentary on these and other issues relating to liability management transactions in the Asia-Pacific region.

	Open Market Repurchase	Tender Offer
Suitability	Suitable for repurchases of a smaller proportion of a series of outstanding debt securities conducted on an opportunistic basis.	<ul style="list-style-type: none"> • Suitable for larger scale repurchases, where issuers intend to retire as large a proportion of the principal amount of an outstanding series of bonds as possible. • In certain circumstances, can be combined with other liability management techniques, such as a consent solicitation, in order to "clean-up" hold-out bondholders.
Publicity	None.	Extensive: given their public nature, tender offers will be accompanied by stock exchange announcements at each key juncture of the transaction.
Pricing mechanism	Privately negotiated price between purchaser and seller in the secondary market, executed as a trade in the over-the-counter market.	<ul style="list-style-type: none"> • Issuer has full flexibility to structure appropriate pricing mechanism. • Market-accepted mechanisms include fixed price offers, a spread over a reference rate or a modified or reverse Dutch Auction bidding process.
Disclosure, anti-fraud and insider trading regulations	<ul style="list-style-type: none"> • No offer or disclosure document required or typically prepared. • As the issuer and the mandated dealers are effectively trading in the secondary market, they must ensure that they are not in possession of any material non-public price sensitive information or other relevant inside information before conducting the open market repurchase, or otherwise ensure that the information is in the public domain. • Material non-public price sensitive information can relate to both (i) information relating to the business, prospects, financial condition, results of operations or cash flows of the issuer that would be material to an investor in the issuer's securities; and (ii) specifically for open market repurchases, the fact that the issuer 	<ul style="list-style-type: none"> • Tender offer memorandum provides a medium through which the issuer conveys its rationale for, and the terms of, the tender offer and provides a basis for disclosure to the market (together with the relevant stock exchange announcements). • Similar considerations in relation to non-public price sensitive information apply.

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	<p>intends to conduct a repurchase transaction and retire a proportion of its debt, and which is likely to trigger a stock exchange announcement at a point in the future.</p> <ul style="list-style-type: none"> The issuer may be compelled by stock exchange rules to make an announcement if its repurchases reach a significant scale or, more generally, either because knowledge of the scale of its purchases will constitute non-public price sensitive information or because the scale of its purchases has been such as to constitute another type of non-public price sensitive information, namely a reduction in the liquidity of the market in the remaining bonds. 	
<p>Practice Point: EU Regulation 596/2014 (the "Market Abuse Regulation" or "MAR") applies where the bonds are admitted to trading on a regulated market or multilateral trading facility in the UK or the EU (including, for example, the London International Securities Market or Luxembourg Euro MTF). MAR imposes additional obligations on issuers in relation to the disclosure of inside information, maintaining insider lists and regulating transactions by persons discharging managerial responsibilities.</p>		
Documentation	Typically none; dealer may require an engagement letter setting out the scope of the mandate to conduct OMRs.	<p>Fully documented, including:</p> <ul style="list-style-type: none"> A detailed tender offer memorandum or offer to purchase document; A dealer-manager agreement between the issuer (and any other obligors) and mandated dealer; Relevant stock exchange announcements; and Opinions from legal counsel.
<p>Practice Point: Although an engagement letter can be helpful to dealers mandated to conducted open market repurchases (for example, by providing for indemnification provisions and repeating representations and warranties from the issuer relating to non-public price sensitive information), care needs to be exercised in framing the terms of the engagement, given that the open market repurchase may, dependent on its size and other prevailing circumstances, be non-public price sensitive information in and of itself.</p>		
Execution timing	No minimum or maximum period; trades are typically executed over the course of a few business days, dependent on market conditions and scope of mandate.	<ul style="list-style-type: none"> If the tender offer is made to U.S. holders, U.S. Securities Exchange Act of 1934, Rule 14e-1 requires offer to be held open for at least 20 US business days, unless the offer qualifies for the abbreviated 5-day tender offer under SEC no action guidance. Where U.S. holders are excluded, no minimum or maximum period, but the time needed for the offer document to be disseminated to holders, and for them to

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		consider and respond to the offer, should be taken into account.
Stock exchange announcements	<p>None – but note:</p> <ul style="list-style-type: none"> • If listed on the SGX-ST: Issuer to immediately announce every 5% of the total principal amount of the bonds (based on the principal amount at the time of listing) redeemed and cancelled. • If listed on the HKSE: Issuer to announce as soon as possible aggregate redemptions of bonds which exceed 10% (and every subsequent 5% interval) of the original principal amount of an issue. • Generally, issuers are under an obligation to disclose non-public price sensitive information: if the intention is to repurchase all or a more than minimal proportion of the bonds, this is likely to constitute non-public price sensitive information. 	As the offer to purchase all or a substantial proportion of an outstanding series of bonds is of itself material information, stock exchange announcements will be made at key junctures in the course of the transaction, including at commencement and expiration of the offer (and in respect of any "early-bird" consent deadline), on finalisation of the results of the tender and on settlement.
U.S. tender offer rules	<ul style="list-style-type: none"> • Not applicable, but note risk of a series of OMRs being treating as "creeping" and treated by regulators as a non-compliant tender offer which does not comply with tender offer rules in the U.S. (i.e. an offer made at the same price equally to all investors). • "Creeping" may also be a regulatory risk if a series of open market repurchases are designed to circumvent mandatory stock exchange announcements and other regulatory requirements that may apply 	Applicable if offers are made to U.S. holders.
<p>Practice Point: Issuers and their advisers should be mindful that, even if the primary offering of the bonds has been conducted outside of the United States (in reliance on the Regulation S "safe harbor" or other exemption from the registration requirements of U.S. securities laws), U.S. tender offer rules would still need to be complied with: for U.S. dollar denominated high yield bonds, in particular, there is a strong likelihood of unassisted flow-back into the U.S. in the secondary market. To exclude U.S. investors entirely from the offer in such a scenario would likely significantly impact the success of any tender offer.</p>		
Impact on existing covenants	<ul style="list-style-type: none"> • Assessing and understanding what the implications of a bond repurchase will be on an issuer's other financing arrangements (such as bank credit facilities and other series of bonds which are not the subject of the repurchase) will be equally necessary for both open market repurchases and tender offers. • For high yield issuers with other series of bonds outstanding, careful consideration should be given to limitation on indebtedness covenants (where the repurchase is being refinanced by other lending) and restricted payments covenants (if the bonds being repurchased are contractually subordinated to other debt). 	

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Equal treatment requirements and the terms of the bonds being repurchased	<p>For either an open market repurchase or tender offer, the terms and conditions and/or indenture of the bonds needs to be reviewed for:</p> <ul style="list-style-type: none"> • a specific provision which permits issuers to repurchase the bonds – absent such a provision, a partial buy-back of the bonds will arguably constitute a breach of the <i>pari passu</i> covenant. • a covenant requiring any repurchase of the bonds to be made on the basis of a tender offer made to all bondholders on equal terms: frequently seen in high yield bond covenants for issuers in the Asia-Pacific, such a provision could serve to exclude an issuer's ability to conduct discrete open market repurchases, as well as to exclude U.S. holders from a public tender offer. 	

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