Markets Brief

Repurchase of Debt

Issue No.11 – January 2015

Introduction

In this edition of Markets Brief, we provide companies and market practitioners with information about the DFSA's approach to the treatment of the repurchase of listed debentures (on or off the market) by issuers or their agents on behalf of the issuer.

For the purposes of this Markets Brief, a reference to a "market practitioner" is to a Sponsor, legal advisor, financial advisor, market maker, auditor, compliance advisor or other similar person connected to an issuer and/or its application for approval of a Prospectus under the Markets Law 2012 (the "Markets Law").

Guidance

Please note that the contents of this communication are not intended to be Guidance as contemplated by the Regulatory Law 2004 and the contents should neither be interpreted, nor relied upon, as Guidance. You should refer to the DFSA Rules for Guidance or contact the DFSA if you require individual guidance.

We recommend that independent legal advice is obtained if you are unsure about any aspect of the DFSA markets regime which may apply to you.

Key considerations

1. **Are there any contractual or other legal restrictions which might apply to a repurchase of debt?**

The issuer should consider whether, for example, the governing instrument of the debenture allows for the repurchase of the debt and whether a debt holder meeting or consent is required.

2. **Will all debenture holders be treated equally?**

An issuer must ensure that all debenture holders are treated equally. MKT Rule 3.3.3 and Listing Principle 6 require an issuer to treat all debenture holders equally in respect of all rights attaching to the debt.

3. **Is the fact of the repurchase by the issuer, of its own debt, "inside information" that needs to be disclosed to the market?**

There is no DFSA rule which specifically requires an issuer to make a public disclosure of its intention to repurchase debt or the fact that it is doing so. However, an issuer is subject to a continuous disclosure obligation to publicly disclose "inside information". So the issuer needs to determine if the fact of its intended or actual

repurchase is information that will fall within the definition of "inside information" in the Markets Law.

Inside Information is defined in Article 63(1)(a) of the Markets Law as meaning information of a precise nature which:

(a) is not generally available;

(b) relates, directly or indirectly, to one or more Reporting Entities or the issuer of the Investments concerned or to one or more of the Investments; and

(c) would, if generally available, be likely to have a significant effect on the price of the Investments or on the price of related investments.

There is no fixed percentage of the total issue size of a series of debt that will trigger a disclosure. Instead, the issuer will need to determine if the nature, size and timing of its proposed repurchase of debt is such that the information is "likely to have a significant effect on the price of the Investments or on the price of related investments". This is likely to be a question of fact that needs to be determined in each case (the impact of the purchase on the liquidity of the remaining securities being one potentially relevant fact). If the information does amount to inside information it would need to be disclosed by the issuer as soon as possible under its continuous disclosure obligations under MKT Rule 4.2.1(1).

Where an issuer is making a series of debt repurchases over a fixed period, and it is concerned that during that period inside information may become an issue, it may be prudent for the issuer to consider issuing a public statement of its intention to purchase debt, and the timing of such repurchases. A clear, publicly-disclosed, prior intention to purchase Securities may be helpful in avoiding any suggestion that the market abuse provisions (such as insider dealing or market manipulation) or continuous disclosure obligations have been breached.

It should be noted that the safe harbour available under Article 64(1)(b) and (2)(g) of the Markets Law for the purchase of shares under a programme does not apply to debt repurchases.

4. Will public disclosure of the results of any debt purchases be required?

Once repurchases have been made, an issuer should consider whether at the time of the repurchase and after each repurchase, it is in possession of inside information.

Factors which an issuer may have to consider include whether the information would, if generally available, have a "significant effect" on the price of the debt and whether it is information of a kind which a reasonable investor would be likely to use as part of the basis of its investment decisions.

5. Other "inside information"

An issuer contemplating a debt repurchase will also need to consider, prior to making any repurchase, if it is in possession of any other information that may be inside information (for example, information about its financial position). If an issuer is in possession of inside information, it must not trade in the relevant Securities or related Securities on the basis of that inside information. It also follows that an issuer should announce the inside information as soon as possible and prior to undertaking any debt repurchases. In addition, MKT3.4.2 prohibits a Restricted Person from dealing in Securities during a close period.

6. Could the issuer's purchase of its own debt amount to market manipulation?

An issuer will also need to consider whether its conduct could result in or contribute to a false or misleading impression as to the supply of, demand for or price of its investments. For example, if other investors are not aware that debt is being repurchased by the issuer and the effect this may have on the liquidity and price of the remaining debt. Again, this may depend on factors such as the extent of the repurchases and what

disclosures have previously been made to the market by the issuer about its proposed activities.

7. What will happen to the debt after it has been purchased?

An issuer must consider the treatment of the repurchased debt. The issuer should ensure that debt holders are informed at the outset what will happen to the repurchased debt – if cancelled, this may have liquidity consequences for debt holders that chose to keep their debt. If it is to be cancelled, the issuer should consult with the DFSA.

8. The DFSA's Code of Market Conduct

We would refer you to the Code of Market Conduct for general guidance on what is "inside information", "insider dealing" and "market manipulation" and what other factors might be relevant. This guidance includes our view on the interpretation of some provisions, examples of conduct that in our view may contravene the law and other conduct that in our view does not contravene the law as regards market abuse. It also sets out factors that we may take into account in determining whether or not conduct may be market abuse.

9. Taking appropriate legal advice

It is important that an issuer works closely with its legal advisers in considering the matters discussed above. Such matters involve making judgements relating to undisclosed information which often require determinations of materiality and may have serious consequences in the event of a breach of the Markets Law 2012, in particular Part 6, Prevention of Market Abuse and Article 41 (Continuous disclosure).

Arabic edition

Every Markets Brief is produced in both English and Arabic and is available on the DFSA website.

Contact us

Visit the DFSA website www.dfsa.ae for:

- previous editions of the Markets Brief;
- access to DFSA-administered legislation and the DFSA Rulebook; and
- full text of the Markets Law 2012, Markets Rules and Code of Market Conduct.

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Feedback

We appreciate your feedback and welcome any suggestions that you may have. Please email us at markets@dfsa.ae