ASISA

GUIDELINES TO ISSUERS AND ARRANGERS IN RELATION TO PRIMARY MARKET ISSUANCE OF LISTED DEBT INSTRUMENTS

11 March 2021

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TO ISSUERS AND ARRANGERS IN RELATION TO PRIMARY MARKET ISSUANCE OF LISTED DEBT INSTRUMENTS

Issuers and Arrangers of programmes or primary market offers of bonds should note this list of recommendations for inclusion in the programme documentation.

The recommendations relate to requirements of investors in terms of transparency, disclosure and investor protection and not to any requirements of any exchange or of the Financial Markets Act 2012.

Effectively there are 3 components of a programme memorandum:

- Risk factors
- Terms and conditions of the notes
- Issuer disclosure

Ease of access and comparability is key for investors. In this regard it is recommended that all issuers adopt a common sequencing of sections so that different issuer documentation can be readily compared, and key terms and conditions can be easily identified.

The recommendations are grouped as follows:

1. **Risk factors**
2. **Programme establishments and updates**
3. **Placement process and post placement feedback**
4. **Investor protection clauses**
5. **Representations and warranties**
6. **Calling of meetings and voting**
7. **Restructuring and default**
8. **Investor Representative**
9. **Penalty interest**
10. **Other**

Note that the terms "Investors" and "Noteholders" are used interchangeably in this document.

1. Risk factors

i. Risk factors must be limited to risks, which are specific to the issuer and/or the securities and which are material for taking an informed investment decision, as corroborated by the content of the registration document and securities note.

ii. Issuers will be required to assess the materiality of the risk factors based on the probability of their occurrence and the magnitude of their potential negative

impact, which, if the issuer chooses, may be disclosed using a qualitative scale of low, medium or high.

iii. Risk factors must be presented in a limited number of categories depending on their nature, the most material being listed first.

iv. Risk factors must either be confirmed as previously stated or updated for any material changes ahead of any security issuance with the relevant statement(s) contained in the Applicable Pricing Supplement of each bond or note.

v. It is further recommended that Risk Factors be disclosed in a live document published on the Issuer's website and reflected as "included by incorporation" into the APS.

2. Programme establishments and updates

2.1 Legal representation

It is assumed that there will be no conflicts of interest between legal counsel for the Issuer, rating agencies, arranging banks nor any other party to the transaction and that any conflicts of interest will be disclosed to prospective investors.

2.2 Circulation of draft documents to potential investors

Each of the potential investors should receive the latest drafts of the main programme documents for review and comment, at least ten (10) business days prior to the deadline for comments.

Initial drafts relating to an update and all revised drafts should be blacklined against, respectively, the existing programme documentation and the preceding drafts. With the initial drafts circulated, investors should be notified of, and given an explanation of the reasons for:
(a) any points that have already been heavily negotiated with the issuer;
(b) in the case of a programme update, any significant changes to the programme terms and conditions compared to the existing terms and conditions and
(c) instances where the draft differs from the ASISA Recommendations to Issuers and Arrangers.

2.3 Investor comments

All comments made in writing by potential investors should be consolidated into a document with responses from the Issuer as to the rationale for non-acceptance or, if accepted but with amendment, reasons for such amendment. Such list should be circulated at least fourteen (14) days before the placement, to all investors who have submitted comments and to any potential investor who requests it. .

The name of an investor making a comment on the documentation should not be disclosed.

2.4 Conditions precedent to closing

Conditions to closing should include delivery to the Arranger of:
(a) opinions addressed to the Issuer from appropriate legal counsel;
(b) a comfort letter(s) from the Issuer's auditor (and any guarantor's auditor) dated the closing date.

Issuers should allow investors to have sight of such with the disclaimer that investors may not rely on such opinions and comfort letters and such are made available “for information only”.

2.5 Taps and increases

An issue intended to be fungible with an issue previously launched should not be launched until at least after the closing date of the earlier issue and preferably not within a period of one month (20 business days), to encourage participation in an auction or private placement and ensure fair pricing.

This should apply to taps of existing bonds or the offering of any new bonds.

3. Placement process and post placement feedback

3.1 Placement process and relevant disclosures

i. Detailed description of the placement methodology (whether uniform price sealed bid auction or book build process to be used, including whether with or without feedback to Investors).

ii. The Issuer should not have the ability to upsize the proposed issuance above the maximum issuance size indicated to potential investors ahead of the placement.

iii. Issuers should provide a minimum issue size per instrument to be placed which, should there be sufficient demand within or below the Issuer's specific price guidance range, the Issuer would commit to issue.

iv. Tapping an instrument should not take place until 20 business days after the initial placement.

v. Disclosure of any committed hard underwriting or any other contractual arrangement, including the quantum, on a "no name" basis, unless it is the Arranger or a related party of the Arranger or Issuer providing same, in which case the Arranger or related party's name should be disclosed; together with a description of any underwriting fees paid for by the Issuer.

vi. Disclosure of any Arranger take-up options.

vii. Disclosure of any Investor groups being excluded from or limited in taking part in the placement (such as banks).

viii. The Issuer and Arranger are encouraged to provide upfront price guidance ranges to Investors prior to the placement date.

ix. actual or potential Issuer or Arranger conflicts of interest should be disclosed to all prospective Investors via a conflict of interest statement in the relevant term sheet. In this context, in the interests of a fair and transparent placement, Issuers and Arrangers are requested to consider whether there is any arrangement in place in respect of the placement, not specifically contemplated above, that would amount to a conflict of interest as generally understood and which should be disclosed to Investors, including potential perceived conflicts between a bank's arranger team and trading desk.

3.2 Post placement feedback

Issuers and Arrangers are encouraged to provide as much information about the placement to Investors as is reasonably possible, including, but without limitation:

i Total bids received;
ii Total bids allocated;
iii Number of bidders;
iv An indication of bid pricing ranges showing levels and volumes;
v Confirmation of any related entity take-up;
vi Confirmation of the allocation methodology; and
vii Confirmation of any excluded Investor groups.

4. Investor protection clauses

4.1 Negative pledge

The following standard wording is suggested:

"For as long as any Note remains outstanding, the Issuer shall not (and the Issuer shall procure that no Material Subsidiary will) create or permit the creation of any Encumbrance (other than a Permitted Encumbrance) over the whole or any part of its present or future undertakings, assets or revenues, to secure any Indebtedness without (a) at the same time or prior thereto securing the Notes equally and rateably therewith or (b) providing such other security for the Notes, as may be approved by an Extraordinary Resolution of the Noteholders."

Where there is a Guarantee(s) in place, the above clause must extend to such Guarantor(s) in additional to any and all subsidiaries.

All forms of Indebtedness should be considered in the above clause. Indebtedness should not be restricted to capital markets debt only, nor should there be exclusion for inter-company debt of non-obligors other than in the ordinary course of business.

Consideration should be given to consistency of Negative Pledge clauses across the Issuer's funding agreements so that investors ranking *pari passu* may benefit from the same undertakings.

A statement detailing any material changes to security interests or guarantees, or alternatively confirmation that no such material changes have occurred, should be made available to Investors prior to any placement.

4.2 Permitted Encumbrance

General Permitted Encumbrance consideration
It is the overarching view of ASISA members that post-issue encumbrances should only be allowed in respect of new assets acquired, post issue. A carve-out may apply should an Issuer wish to make use of existing assets as security for additional indebtedness, only where such additional indebtedness is considered immaterial in relation to the size and nature of the Issuer's company. Consideration of post-issue encumbrances and the materiality thereof should be given on both a transactional and cumulative basis.

Specific Permitted Encumbrance

Encumbrance: defined as any mortgage, pledge, hypothecation, assignment, cession in *securitatem debiti*, deposit by way of security or any other agreement (whether conditional or not and whether relating to existing or future assets), having the effect of providing a security interest or Quasi-Security to a creditor or any agreement or arrangement to give any form of a secured claim to a creditor but excluding statutory preferences, or any security interest arising by operation of law.

For the purpose of the paragraph above, "Quasi-Security" means any of the following arrangements or transactions as may be appropriate under the circumstances:

(i) sell, transfer or otherwise dispose of any of its assets on terms whereby they are or may be leased to or re-acquired by an Issuer [or any other member of the Group];
(ii) sell, transfer or otherwise dispose of any of its receivables on recourse terms;
(iii) enter into or permit to subsist any title retention arrangement;
(iv) enter into or permit to subsist any arrangement under which money or the benefit of a bank or other account may be applied, set-off or made subject to a combination of accounts; or
(v) enter into or permit to subsist any other preferential arrangement having a similar effect, in circumstances where the arrangement or transaction is entered into primarily as a method of raising Financial Indebtedness or of financing the acquisition of an asset.

4.3 Fundamental Transactions

A disposal of assets restriction that limits the scope for asset stripping and financial engineering that is detrimental to any Note's structural integrity is required. It is important that investors have protection that the structure of the balance sheet of the Issuer and each Guarantor (if applicable) will be maintained, as far as possible, for the term of the note.

Asset disposals, mergers, amalgamations and corporate restructures (including internal restructures and unbundling transactions) ("**Fundamental Transactions**") should be restricted so that they do not impact on the ability to service debt. Fundamental Transactions over a particular threshold (e.g. 5% of total assets), either in one transaction or cumulatively over the life of the Notes, require approval by Noteholders through a Special Resolution. To maintain the integrity of the clause, no carve outs or exemptions, such as "except in the normal course of business" should be made.

Mergers, amalgamations and corporate restructuring should also require Noteholder consent by way of Special Resolution, as described, unless the liabilities are assumed by the surviving entity and the surviving entity has the same or better credit rating as verified by an external credit rating agency, where the Issuer and/or instrument was rated by a credit agency prior to the merger or restructure.

4.4 Guarantees

It is the view of ASISA members that consideration should be given to adopting the local syndicated lending market's form of guarantee and indemnity to be used as standard form in the local bond market, i.e. an accessory suretyship coupled with a primary obligation indemnity.
It is also the view of ASISA members that any local bond guarantee must as a minimum contain the following:

- i The Guarantee must be irrevocable, unconditional, on demand and only expire once the debt has been fully extinguished.
- ii The amount of the Guarantee must be sized to include any amount outstanding to the lenders (including interest/inflation accretion, break costs, penalties etc) and be a continuing obligation.
- iii A renunciation by the Guarantor of the benefit of excussion so that bondholders may proceed directly against the guarantor before first proceeding against (excussing) the Issuer.
- iv A comprehensive waiver by the Guarantor of all the defences which would otherwise be available to it as a common law surety, including invalidity, illegality and unenforceability of the issuer's principal obligation.
- v Confirmation by the guarantor that it will pay the Noteholders under the guarantee even if the Issuer withholds or refuses to make payment in order to comply with any law or regulation of the RSA or to comply with any order of a court of competent jurisdiction.
- vi A predetermined process must be in place and described in the Guarantee to maintain the Guarantor pool, including the accession or removal of guarantors. The removal of guarantors must only apply in limited circumstances, such as in the case of deregistered or dormant entities, or otherwise be approved by Special Resolution.

4.5 Early Redemption Events

For the avoidance of doubt, Early Redemption Events are distinct from Events of Default. The following Early Redemption Events are required:

i **For tax reasons**, illegality, sanction or change in law

The above shall be both at the option of the Issuer and the Noteholders. Where it becomes illegal for the Investor to continue to own the bonds, Early Redemption shall be at the option of the Noteholders.

Insofar as proposed amendments to law are concerned, the redemption contemplated above should only be allowed in respect of an actual change to law, with the redemption price proposed at market value and specified upfront. Where an Issuer wishes to redeem based on an actual change in law, the Issuer is to furnish Investors with a legal opinion, issued by a law firm independent to the Issuer, detailing the appropriate change in law.

ii **Change of Control**

A change in control of the Issuer, any Guarantor(s) or of any material subsidiary of the Group that results in a rating downgrade of the Issuer, Group or note shall result in an Early Redemption at the option of Noteholders. Mergers, amalgamations and corporate restructures, including internal restructures, shall not be excluded from this clause.

iii **The removal of a credit rating** or credit rating agency without replacement of a suitable alternative that is acceptable to Noteholders.

iv **Breach of covenants**

Not rectified within predetermined grace periods.

v **Material Adverse Change**

As voted by 75% of Noteholders. Including, but not limited to:

a) significant turnover of the Board and/ or executive management within a 12-month period;
b) material breach of the Issuer's corporate governance policies, anti-corruption laws, the Public Finance Management Act (where applicable) or any law or regulation of the RSA;
c) corruption, bribery or convictions that result in a Material Adverse Change.

vi **Qualified** or disclaimed Annual Financial Statements

vii **Equity Delisting**

Given that this has both mandate (Refer Regulation 28 and Board Notice 90) and investment thesis implications, it is proposed that an Equity Delisting Event will be catered for, with redemption at the option of Noteholders.

viii **Debt Delisting**

At the option of Noteholders.

4.6 Events of Default

The obligation to call an Event of Default, as described below, is on the Issuer, however, Noteholders must have the option to call an Event of Default.

4.6.1 Events of Default should include, at least, the following:

i Non-payment

ii Illegality, repudiation

iii Non-compliance with the law, regulations and breach of reps and warranties that lead to a Material Adverse Change

iv Insolvency, litigation, cession of business, material change in business

v Cross Default and Cross-Acceleration

ASISA is of the view that cross default and cross-acceleration thresholds are contentious and cannot be standardised across Issuers. The inclusion is a matter of principle. The principle is that a cross default or cross-acceleration clause is required, which needs to be appropriately sized so that investors are given adequate protection.

The cross default or cross-acceleration clause should extend beyond the Issuer to all material entities within the Issuer Group.

The cross default or cross-acceleration should apply across all funding of the Issuer.

4.6.2 "Notes" vs "Series of Notes"

The Events of Default clause(s) should cover all notes issued under the Issuer DMTN Programme, regardless of seniority.

4.7 Notification of an Event or Potential Event of Default

The Issuer must undertake to immediately notify Noteholders of Events of Default or potential Events of Default, which should be defined as an event or circumstance which would, with the expiry of time or any applicable grace period, the giving of notice or the making of any determination under the notes, be an event of default.

4.8 Most favoured nation

A "Most favoured nation" clause must be included so that Beneficial Note amendments of the Issuer's agreements with existing Noteholders are offered or extended to all Noteholders rateably. This includes all arrangements with existing or future Noteholders that reference the DMTN.

5. Representations and warranties

The principles must be included in the Programme Memorandum and actual affirmation included in each Applicable Pricing Supplement.

The Issuer must warrant that no Material Adverse Change in financial or trading position of the Issuer, since the publication of the last audited financial statements, has occurred prior to any placement, regardless of the method of placement and including taps.

The Issuer (and any applicable Guarantors) should be deemed to make certain repeating representations by reference to the facts and circumstances then existing on the first day of each interest period or such other regular dates as may be appropriate in the circumstances.

Examples of repeating representations include:

i) Status
ii) Governing law and enforcement
iii) Non-conflict with other obligations
iv) No default
v) Pari passu ranking
vi) Immunity
vii) Environmental laws
viii) Taxation
ix) Anti-corruption laws and sanctions
x) Security

Furthermore, since Noteholders are not party to the Programme Agreement, such representations and warranties and undertakings which are provided in such, are expected to be included in the Programme Memorandum and/or Applicable Pricing Supplements including, but not limited to:

- Representations
- Undertakings
    i. Notification of material developments
    ii. Updating of Programme Memorandum
    iii. Listing
    iv. Lawful Compliance
    v. Auditor Comfort Letters
    vi. No other issuance/clear issuance

6. Calling of meetings and voting

6.1 Voting rights

The Issuer and any related entity to it should be prohibited from exercising any voting rights in respect of the Issuer's debt instruments, irrespective as to whether any Notes may be held by such party.

6.2 Register of noteholders

ASISA appreciates the practical difficulties in maintaining an up-to-date register of Noteholders reflecting the ultimate beneficiary as well as any third-party manager of such. Insofar as it is practically possible, the Issuer must undertake to maintain an up-to-date register of Noteholders, listing the asset manager as well as the beneficial owner. This is to be made available to the Investor Representative on demand, to enable the calling of a meeting, the establishment of a Committee etc.

6.3 Access to legal representation

Noteholders should be entitled to the assistance of one legal counsel at the expense of the Issuer under the following circumstances:

- Following the occurrence of any Event of Default or potential Event of Default,
- For the consideration of any amendment, waiver or consent to the terms and conditions of the Programme that affect the rights or interests of Noteholders.

Under such circumstances, Noteholders should obtain at least 3 quotes for a defined scope of work and a defined time period. Should such be exceeded for reasons beyond the control of Noteholders, then the fees should continue to be paid by the Issuer.

6.4 Noteholder Committee

In certain instances, a Noteholder Committee must be established, including in the case of Issuer Events, change of terms, Events of Default or potential Events of Default, if called by at least [10%] of Noteholders.

The Noteholder Committee must represent at least [25%] of nominal notes outstanding. The Noteholder Committee is responsible for the appointment of legal counsel to represent Noteholders. The Noteholder Committee will act as a contact point for the Issuer but cannot bind Noteholders. The costs of legal counsel incurred are to be paid by the Issuer.

6.5 Meeting standards and protocols

The inclusion of a meeting standards framework which provide for Investors' rights to:

i call a meeting;
ii appoint a chairman;
iii access legal representation as required;
iv regulate the voting mechanisms and quorum requirements.

Appropriate meeting Noteholder protocols are to be outlined, including:

i voting by Noteholders for the Chair of any Noteholder Meetings;
ii the agreed minimum percentage of noteholders that can call a meeting (suggested at 10%);
iii the obligation on the Issuer to issue SENS notification of the meeting;
iv agreed pre-meeting information requirements to be provided by the Issuer;
v exclusion from voting of debt held by related and/ or conflicted parties;

vi the manner in which voting is conducted (suggested by nominal holding), etc.

Note that where there is a meeting at which votes shall be counted, the Chair must be independent and not appointed by the Issuer.

7. Restructuring and default

Should the Issuer seek amendments, waivers, consents or rescheduling to the rights or interests of Noteholders or if an Event of Default has occurred, a Noteholder Committee will appoint legal representation for Noteholders, the cost of which must be paid for by the Issuer, as per clause 6.3 above.

8. Investor Representative

It is recommended that the Issuer appoint an independent Investor Representative to co-ordinate Noteholders and to ensure that the Issuer has agent for Noteholders with whom to negotiate and communicate. Such would only be required in the circumstances which would require the appointment of legal counsel to act on behalf of Noteholders as per clause 6.3 above.

Under such circumstances, Noteholders should obtain at least 3 quotes for a defined scope of work and a defined time period. Should such be exceeded for reasons beyond the control of Noteholders, then the fees should continue to be paid by the Issuer.

9. Penalty interest

Default interest, including the circumstances under and date from which default interest will apply, is to be clearly specified and turned on for all notes.

10. Other

- The Applicable Pricing Supplement to each listed debt instrument must remain on the Issuer's website until the instrument has been fully redeemed.
- Covenant definitions and calculation methodologies must be clearly defined. The result of covenant testing should be published via SENS or posted on the issuer's website within 5 business days of the testing date.
- Fall-back language for floating rate notes referencing JIBAR is suggested to cover the situation whereby Jibar is replaced by an alternative reference rate.
- All noteholders should be bound under collective action clauses, i.e. where an extra-ordinary majority [75%] of Noteholders agree to an action.
- Negative rating actions on notes should result in a margin ratchet where the credit rating drops two notches below the rating at issuance. If the credit rating is downgraded [x] notches below the rating at issuance, an optional redemption event, at the option of the Noteholder, should occur.
- Arrangers should make available the form of Due Diligence that is undertaken on the Issuer.

11 March 2021

HISTORY OF AMENDMENTS

Effective date	Amendments
11 March 2021	• Approved by ASISA Investment Board Committee

Responsible Senior Policy Advisor: Gill Raine