

Dentons DCM Quick Guides

Practical summaries of 2021 Hot Topics in Debt Capital Markets, condensed to be digested alongside your morning coffee...

DEAL OR NO DEAL? ALL ABOUT THE ROADSHOW

This note is written in the context of questions that are frequently asked on DCM bond issues in the European market, which are being offered to professional investors and under an exemption to the registration requirements of the US Securities Act of 1933, on either a Regulation S or a Rule 144A/Regulation S basis. It is therefore 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 bond issue and issuer should be considered and specific legal advice sought.

WHAT IS A DEAL ROADSHOW?

After all the desk and office based work an issuer, its DCM bankers and their legal counsels go through to prepare a preliminary (or “red herring”) prospectus ready to launch and market a transaction, it is no wonder that the issuer’s senior management and the DCM banking teams are keen to “hit the road” for the **deal roadshow**. Despite recent relaxations, ongoing restrictions on travel and a sense of caution on the part of some potential attendees to group events means that the ability for a DCM roadshow to “hit the road” at the present time only really exists in the virtual sense, with video conferencing replacing the multi-city stops and traditional meetings. However, the central element of a deal roadshow remains the opportunity for an issuer’s senior management to market the pending offer of securities to potential investors, with the banks appointed as lead managers for the bond issue organising the schedule and inviting appropriate participants.

A deal roadshow is therefore connected to a specific offering of securities, and usually involves a concentrated marketing effort shortly after the finalisation of the preliminary prospectus¹ in the standalone bond issue context, or else following the establishment or update of an MTN or GMTN programme and publication of the relevant base prospectus, to market an imminent drawdown off the newly established or updated programme.² Not all securities offerings require roadshows – the issuer and its credit story may be sufficiently well known that the marketing exercise of a roadshow is not required (e.g. a frequent issuer with an MTN or GMTN programme), or the particular circumstances of the issue (e.g. a tap issue to existing investors) may mean that there is no need for a roadshow marketing exercise.

The **investor presentation** (the slide deck that is discussed at the deal roadshow) will contain highlights of financial and other information on the issuer and any guarantors, their business, financial information and certain key terms of the proposed offering. The investor presentation is designed to assist in the explanation of the issuer’s credit story and the terms of the proposed offering to potential investors, by summarising and highlighting key information in an investor-friendly format. However, the investor presentation is not a disclosure document on which investors should be making their investment decision; the information contained in the investor presentation must be drawn from and be consistent with that in the prospectus (see below: *What content can be included in a deal roadshow?*).

It is also important to remember that not all roadshows are related to a securities offering (a “non-deal roadshow”). While a deal roadshow will be an “advertisement” for the purposes of the EU Prospectus Regulation/UK Prospectus Regulation, a non-deal roadshow is not an advertisement and thus the requirements of the relevant Prospectus Regulation and the EU Delegated Regulation on Advertisements for Securities and its UK equivalent (as defined below) do not apply to non-deal roadshows (see below: *What content can be included in a deal roadshow?*).

- 1 The term “prospectus” is used generally to refer to the offering document. The considerations discussed here are the same, even where it is not a “prospectus” within the meaning of the EU Prospectus Regulation or the UK Prospectus Regulation.
- 2 Although uncommon, it is also theoretically possible to have a “red herring” MTN or GMTN programme prospectus taken on a roadshow prior to the publication of the programme base prospectus.



WHAT IS A NON-DEAL ROADSHOW?

A **non-deal roadshow** is generally part of an ordinary course investor education or investor relations exercise which is unrelated to a specific transaction. Accordingly, the focus of a non-deal roadshow is on the company generally, its business operations and financial performance, in order to strengthen the market understanding of the company's credit story and deepen relationships with the investor community. Non-deal roadshows may be occasional or *ad hoc* but, if a company does have a pending securities offering, the timing of any non-deal roadshows needs to be carefully considered (see below: *If an issuer has just held a non-deal roadshow can the issuer immediately start a deal roadshow?*). Traditionally, non-deal roadshows tend to be regular, repeated events, as part of a company's ordinary course investor relations calendar in order to communicate regularly with investors.

WHAT CONTENT CAN BE INCLUDED IN A DEAL ROADSHOW?

Information should be drawn from and consistent with the prospectus

A deal roadshow/investor presentation should provide information which is consistent with, and extracted from, the information in the prospectus and should not include material information which is not in the prospectus. If during the drafting of an investor presentation it becomes clear that additional specific items of information are necessary for the marketing of the bond, that information should be considered material/necessary to an investor's investment decision and must therefore be included in the prospectus (or a supplement thereto, where there is an existing base prospectus or equivalent document) (see box: *Prospectus disclosure standard*).

Prospectus disclosure standard

If information is material to an investor's investment decision, it must be included in the prospectus.

For bond offerings to which Regulation (EU) 2017/1129 (the **EU Prospectus Regulation**) and/or the UK's onshored version of the EU Prospectus Regulation (the **UK Prospectus Regulation**) apply, the prospectus must contain:

"the necessary information which is material to an investor for making an informed assessment of: (a) the assets and liabilities, profits and losses, financial position, and prospects of the issuer and of any guarantor; (b) the rights attaching to the securities; and (c) the reasons for the issuance and its impact on the issuer." (Article 6(1))

Even if a bond offering is outside the scope of the EU Prospectus Regulation or UK Prospectus Regulation, the multi-lateral trading facilities on which wholesale debt issues are commonly listed in Europe have similar general content requirements regarding the information to be contained in a prospectus. For example, the London Stock Exchange's International Securities Market (**ISM**) rulebook requires:

"The admission particulars shall contain all information which, according to the particular nature of the issuer and of the Securities to be admitted to trading on ISM, is necessary to enable users of ISM to make an informed assessment of the ability of the issuer to meet its obligations to holders of the Securities." (Section 2, paragraph 3.1)

If the offering includes a US placement, US liability considerations should also be taken into account, most notably Rule 10b-5 under the US Securities Exchange Act of 1934, as amended. Rule 10b-5 makes it unlawful *inter alia*, to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, in connection with the purchase or sale of any security.

The investor presentation contents should be drawn entirely from the prospectus contents, which in turn contain all necessary information material for an investor's investment decision, regardless of whether the bond is being offered pursuant to the EU Prospectus Regulation or UK Prospectus Regulation, or pursuant to an exemption to such regulations and listed on a multi-lateral trading facility such as the ISM.

Additional legal requirements applicable to investor presentation contents where there is a prospectus pursuant to the EU or UK Prospectus Regulation

The general considerations discussed above, relating to the requirement that the information in the investor presentation be drawn from and be consistent with the prospectus, have also been supplemented by specific provisions of EU (and as retained EU law, now also UK) regulations, including in provisions of the EU Prospectus Regulation/UK Prospectus Regulation itself, applicable where there is a listing on a regulated market in Europe/the UK, or where the offer is to the public in Europe/the UK.

Article 22(4) of the EU Prospectus Regulation and the UK Prospectus Regulation explicitly requires that a deal roadshow investor presentation "be consistent with the information contained in the prospectus" and Article 22(5) prohibits the selective disclosure of material information only to deal roadshow attendees by requiring that any material information that is selectively disclosed be made available to all investors to whom the offer is addressed. Therefore, the investor presentation cannot contain any material information that is not in the prospectus.

Article 16 of Commission Delegated Regulation (EU) 2019/979 of 14 March 2019, supplementing the EU Prospectus Regulation (the **EU Delegated Regulation on Advertisements for Securities**) (and the equivalent retained EU law version of the EU Delegated Regulation on Advertising applicable in the UK) (the **UK Delegated Regulation on Advertisements for Securities**), prohibits including information in an investor presentation which contradicts information in the relevant prospectus, or presents a materially unbalanced view of the information contained in the prospectus, or which includes alternative performance measures which are not included in the prospectus.

Investor presentation content requirements in European and UK regulation

EU Prospectus Regulation/UK Prospectus Regulation:

"All information disclosed in an oral or written form concerning the offer of securities to the public or the admission to trading on a regulated market, even where not for advertising purposes, shall be consistent with the information contained in the prospectus." (Article 22(4))

"In the event that material information is disclosed by an issuer or an offeror and addressed to one or more selected investors in oral or written form, such information shall, as applicable, either:

- a. *be disclosed to all other investors to whom the offer is addressed, in the event that a prospectus is not required to be published in accordance with Article 1(4) or (5); or*
- b. *be included in the prospectus or in a supplement to the prospectus in accordance with Article 23(1), in the event that a prospectus is required to be published." (Article 22(5))*

EU Delegated Regulation on Advertisements for Securities/UK Delegated Regulation on Advertisements for Securities:

"Information concerning offers of securities

1. *Information disclosed in oral or written form concerning an offer of securities to the public or an admission to trading on a regulated market, whether as an advertisement or for other purposes, shall not:*
 - a. *contradict the information in the prospectus;*
 - b. *refer to information which contradicts the information in the prospectus;*
 - c. *present the information in the prospectus in a materially unbalanced way, including by way of presentation of negative aspects of such information with less prominence than the positive aspects, omission or selective presentation of certain information;*
 - d. *contain alternative performance measures unless they are contained in the prospectus." (Article 16(1))*

Additional US securities law issues

If the offering includes a placement into the US, it is particularly important that the investor presentation is not sent physically into the US. If it is sent into the US, it may be construed as an offering document for US securities law purposes, and be subject to the same considerations with respect to permitted offerees and recipients, as well as liability, as the prospectus. For this reason, in a Rule 144A/Regulation S offering, the investor presentation is not generally left behind with or sent by email to investors, but rather only made available in connection with invitations to contemporaneous live presentations (i.e. roadshow meetings) (see below: *Can roadshow attendees keep a copy of the slides?*).

Liability for information in a prospectus and the investor presentation

Ensuring consistency between the contents of the investor presentation and the prospectus is also key from a liability perspective. The information which is included in the prospectus is subject to extensive review/investigation to ensure its accuracy, especially on a Rule 144A/Regulation S offering. A due diligence exercise is carried out in order to ensure that the prospectus contains all material information, the financial information in the prospectus is subject to auditor review (and a comfort letter), and the issuer and any guarantors are required to give a representation in the subscription agreement to the effect that the prospectus contains all material information and that the information included in the prospectus is correct, not misleading and omits nothing material.

Although the investor presentation is often reviewed by legal counsel (particularly in the case of a Rule 144A/Regulation S offering), it is not subject to the

same level of scrutiny as a prospectus. For example, there is usually no auditor review or auditor tick and tie of the investor presentation, and the drafting will by nature be more commercial and less detailed than the prospectus, and without the sort of cautionary or risk language that generally appears in a prospectus. Consequently, any “new” information included in an investor presentation that is not included in the prospectus, quite apart from the regulatory and listing prohibitions above, exposes the issuer, guarantors and potentially the managing banks to additional liability risks because:

- a. it raises a question as to whether the prospectus does in fact contain all material information. If the new information is sufficiently material to be included in the investor presentation, then by definition it is material and must be included in the prospectus; and
- b. unlike information in the prospectus, the “new” information has not been subject to the same degree of diligence and auditor comfort, nor the same level of legal review and scrutiny.

Inside information should never be disclosed in an investor presentation or prospectus

It is also worth remembering that a prospectus for an issuer with listed securities should never contain inside information, and if it is desired to include information that is material but currently non-public in the prospectus, that information should first be publicly released in a manner consistent with the issuer’s obligations under Regulation (EU) No 596/2014 (the **Market Abuse Regulation**) and/or the UK’s onshored version of the Market Abuse Regulation (**UK MAR**). On the same basis, inside information should never be included in the roadshow investor presentation.



WHAT CONTENT CAN BE INCLUDED IN A NON-DEAL ROADSHOW?

As mentioned above, non-deal roadshows are ordinary course investor relations exercises which are unrelated to a specific transaction. Non-deal roadshows should not contain material non-public information and they should not include any details on the proposed terms of any securities offering. A non-deal roadshow is therefore not an advertisement for the purposes of the EU Prospectus Regulation or UK Prospectus Regulation, as it does not satisfy limb (i) of the relevant definition.

EU Prospectus Regulation/UK Prospectus Regulation definition of “advertisement”

“‘advertisement’ means a communication with both of the following characteristics:

- (i) relating to a specific offer of securities to the public or to an admission to trading on a regulated market;
- (ii) aiming to specifically promote the potential subscription or acquisition of securities;”

Therefore, a non-deal roadshow is free from the content requirements imposed by the EU Prospectus Regulation and the EU Delegated Regulation on Advertisements for Securities, as well as their UK equivalents.

In particular, a non-deal roadshow is not subject to the requirement against presenting information in a materially unbalanced way, the omission or selective presentation of certain information, or the inclusion of alternative performance measures (that are not included in the issuer’s offering prospectuses).

However, despite this theoretical freedom in relation to content for non-deal roadshows, from a market reputation perspective and minimisation of risk of liability for negligent misstatement, it would be advisable for an issuer to take steps to avoid its non-deal roadshow materials containing information which contradicts, or which is not consistent with, the information in a prospectus which is subsequently used to sell securities to investors. This is important as non-deal roadshows, not being connected with an offering, are not usually subject to the same concerns or limitations on attendees being able to retain copies (either in hard copy or soft copy form) of the investor presentation slides (although concerns may arise in relation to the timing of a non-deal roadshow

in relation to a bond issue – see below: *If an issuer has just held a non-deal roadshow, can the issuer immediately start a deal roadshow?*)

CAN ROADSHOW ATTENDEES KEEP A COPY OF THE SLIDES?

While less of an issue in virtual roadshows, where the investor presentation slides are made available electronically (e.g. through NetRoadshow or a similar platform) and hard copies are not distributed to attendees, the question of whether an attendee can retain a copy of the investor presentation slides is still relevant (e.g. can an issuer provide a PDF copy of the slides to an attendee of a virtual roadshow?).

From a legal perspective, the short answer is that regardless of whether the deal roadshow relates to a Rule 144A/Regulation S or Regulation S only offering, for the minimisation of the risk that an investor will make an investment decision based on the investor presentation and not the prospectus, investment banks acting as managers on the bond issue typically have policies which prohibit deal roadshow attendees from retaining investor presentation slides. If provided in hard copy at a physical roadshow, the slides should be collected at the end of the meeting. Similarly, deal roadshow investor presentation slides should not be sent to attendees in soft copy.

On a Regulation S bond issue, the legal rationale for why it is advisable that copies of deal roadshow slides are not retained by investors is that an investor should be making its investment decision based on the information contained in the prospectus, not the highlights summary which is the investor presentation and which does not set out the risk factors and full terms and conditions of the issue as contained in the prospectus.

In addition to the rationale that an investment decision should be made on the information in the prospectus not the investor presentation, due to US securities law concerns an even stricter approach is taken in the Rule 144A/Regulation S context. Copies of investor presentation slides should never be left with attendees and soft copies should never be provided to attendees on Rule 144A/Regulation S deals. The investor presentation which accompanies a “live” oral roadshow presentation (whether in person or virtually), provided copies are not left with attendees, will not be considered a written offer for US securities law purposes (and thus will not be a

free-writing prospectus and will not trigger any risk of SEC filing requirements). Virtual roadshows are permitted for Rule 144A/Regulation S offerings where access to the roadshow is password-protected, the password is separate for each offering, and the passwords are only issued to potential investors reasonably believed to be Qualified Institutional Buyers (QIBs). As discussed above, if the presentation is treated as an offering document, investors could raise claims on the same basis as with respect to the prospectus (including claims predicated on Rule 10b-5). However, the investor presentation would not have been subject to the same level of due diligence scrutiny or drafting care as the prospectus, and would not ordinarily be the subject of auditor comfort or form part of the negative assurance letters (10b-5 letters) delivered by counsel.

By comparison, as a non-deal roadshow should not be connected with an offering, there is not usually an issue with attendees retaining either a hard or soft copy version of the investor presentation slides of a genuine non-deal roadshow.



IF AN ISSUER HAS JUST HELD A NON-DEAL ROADSHOW, CAN THE ISSUER IMMEDIATELY START A DEAL ROADSHOW?

If an issuer has already decided to launch a debt offering (for example, if banks have been mandated as managers of a deal), even if the final board or management approval (as the case may be) to announce the transaction is subject to market conditions or other factors, it becomes extremely difficult to claim that an investor presentation is a non-deal roadshow and not a deal roadshow. As a result, in most cases, such a situation should be treated as a deal roadshow and the information provided in the investor presentation should be consistent with the information in the prospectus. Thus, the roadshow should be scheduled for after the announcement of the offering (by which time the preliminary prospectus would usually also be available). In addition, continuing with a non-deal roadshow after a decision by an issuer to commence preparations for a debt offering is also problematic because the issuer will be limited in what it can say about its future debt offering plans while avoiding misleading the attendees at the non-deal roadshow as to whether or not a bond issue is currently planned. However, issuers with an existing MTN programme and current base prospectus will tend to have more flexibility, as the nature of the programme means that an issuer is able to launch an offering on short notice (for example, to align funding requirements with favourable market conditions and anticipated investor demand).

However, if the issuer is considering launching a debt offering shortly after the conclusion of a non-deal roadshow, but no final decision that a deal is going to be launched has yet been made, then there are sensitive questions to consider. For example:

- a. will information be disclosed about the potential deal to investors? Typically, no deal information would be disclosed in a non-deal roadshow. If the issuer wishes to discuss the potential transaction, the roadshow should be more accurately characterised as a deal roadshow and should be rescheduled such that it follows a transaction announcement (which, as mentioned above, would usually mean a preliminary prospectus is also available);

- b. the Market Abuse Regulation and UK MAR, are also potentially relevant where the issuer has securities listed on a UK or EU regulated market, multi-lateral trading facility or organised trading facility. A true non-deal roadshow, held in advance of any planned bond issue and at which any future bond issue will not be discussed at all (either in the investor presentation, in oral commentary or in any Q&A), should not amount to “market soundings” for the purposes of the Market Abuse Regulation/UK MAR. However, the closer a non-deal roadshow is held to a debt offering, the more sceptically a regulator may scrutinise the issuer’s and the managing banks’ claims that the non-deal roadshow was not “*the communication of information, prior to the announcement of a transaction, in order to gauge the interest of potential investors in a possible transaction and the conditions relating to it such as its potential size or pricing, to one or more investors...*” (Article 11 definition of “market sounding”);
- c. would the presentation be viewed by investors as part of the marketing for the offering (for example, because it is provided in such close proximity to the offering or because of the contents of the presentation)? While it should be possible to conduct meetings in the US, in certain circumstances, meetings conducted in the US could even be construed as “directed selling efforts” or “general solicitation” or “general advertising” for the securities, thereby rendering unavailable Regulation S for the offering outside the US, or relevant exemptions for an offer inside the US;
- d. is the information that will be disclosed in the non-deal roadshow consistent with what will be presented to investors in connection with a future offering? While it is likely that additional information will be disclosed in connection with any offering (at a minimum with respect to the securities proposed to be issued and the use of proceeds), any inconsistency may adversely impact the reputation of the issuer and potentially result in liability;
- e. will the manner in which the meetings are arranged or structured “tip off” investors that an offering is likely? For example, is the number of meetings, or the jurisdictions visited, or the role or identities of any financial advisers involved in arranging meetings, sufficiently different from the issuer’s past investor relations efforts that investors would be “tipped off” about a forthcoming offering? If so, the analysis of the foregoing items should be considered with particular care.

The risk of a sceptical view being taken by a regulator, or an aggrieved investor claiming information communicated in the so-called non-deal roadshow was false or misleading, would likely be heightened where an issuer is not a frequent issuer and the non-deal roadshow is not part of a regularly scheduled investor relations exercise (e.g. following interim or annual results), but was scheduled *ad hoc*. If the non-deal roadshow were in fact a market sounding, then various requirements follow under the Market Abuse Regulation/UK MAR – for example, a “disclosing market participant” is required to consider whether the market sounding will involve the disclosure of inside information and to record its conclusions, as well as record the communication, with the consent of the recipient of the sounding. A deal roadshow, by comparison, typically follows a launch “announcement” and the availability of the preliminary prospectus, so a typical deal roadshow will not involve “market sounding” as defined in Article 11 of the Market Abuse Regulation/UK MAR.

For the above reasons, most banks acting as managers on bond issues have internal policies and compliance guidelines to suggest a “cooling-off period” between the conclusion of a non-deal roadshow and the launch of a new debt offering. That said, there is no specific cooling-off period required in the Market Abuse Regulation/UK MAR, or in US securities laws or regulations, designed to assist in avoiding a deal roadshow or a market sounding masquerading as a non-deal roadshow; any such period should instead be based on an assessment of the relevant facts and circumstances, as well as the compliance policies of the financial institutions involved in any offering.

RETURN TO NORMALCY?

Although a return to normalcy and international travel, and thus the practice of multi-city in-person roadshow meetings, still appears to be some way off in the future, roadshows, at least in virtual form, continue to be a constant in the process of a debt capital market bond offering.

The legal issues and risks that arise from deal roadshows containing information not drawn from the prospectus, deal roadshow materials being made available in soft or hard copy to attendees, a deal

roadshow purporting (like a wolf in sheep's clothing) to be a non-deal roadshow, or market soundings masquerading as non-deal roadshows, remain just as relevant, regardless of the current use of virtual roadshow formats.

If you do wish to discuss non-deal roadshows, deal roadshows, prospectus liability, or any other issues in the debt capital markets further, please feel free to contact any of the Dentons Debt Capital Markets team. We are happy to chat, on the phone or via video-conference.

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