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Dentons DCM Quick Guide to Auditor Comfort Letters

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A common requirement for bond issues is the delivery of auditor comfort letters in form and substance satisfactory to the joint lead managers. The issuer's independent auditors are tasked with delivering letters to the managers giving comfort on the accuracy of the financial information contained in the offering document and providing details on certain changes in the issuer's financial position since the latest audited/reviewed financial statements. This Quick Guide addresses why the comfort letter is so important for the managers, what levels of "comfort" it provides, and outlines common issues (as well as some more unusual situations) that arise during the preparation and negotiation of comfort letters.

This Quick Guide is written in the context of senior unsecured DCM bond issues by corporates in the European market, offered to professional investors and under an exemption to the registration requirements of the US Securities Act of 1933 (as amended) (the **Securities Act**), on either a Regulation S or a Rule 144A/ Regulation S basis.

Who has liability for errors and omissions in the financial information in an offering document?

While the EU and UK Prospectus Regulation (in relation to bonds offered to the public or listed on a regulated market) or the rules of the relevant stock exchange-regulated market on which bonds are listed provide that it is the issuer[1] that is responsible for the accuracy and completeness of the information in an offering document (rather than the managers), there are circumstances in which managers do need to be wary of potential liability, even on Regulation S only offerings under which managers do not have any statutory liability for inaccurate disclosure under UK law.[2]

1 For example, Article 11(1) of the EU and UK Prospectus Regulation states that the responsibility for the information contained in the prospectus attaches to at least the issuer (or its administrative, management or supervisory bodies), the offeror, the person asking for the admission to trading on a regulated market or the guarantor, as the case may be.

2 While managers cannot be the subject of a s90 or s90A Financial Services and Markets Act 2000 claim in the UK, provided they have not taken responsibility for the contents of an offering document, the English courts have previously found that managers owe a duty of care to investors – for example, in the context of taking reasonable steps to ensure that transaction documentation was properly executed. This raises at least the possibility that an English court may in the future find a similar duty of care to investors exists for managers on a bond transaction, in the context of taking reasonable steps to ensure that the information disclosed in a prospectus is accurate and not misleading.

In relation to a Rule 144A/Regulation S offering which has targeted US investors,[3] both the issuer and the managers have potential statutory liability for deficient disclosure pursuant to, amongst others, Rule 10b-5 under the US Securities Exchange Act of 1934, as amended, and Section 17 of the Securities Act.

As the historical financial information in an offering document is a key part of the disclosure to investors, it is therefore in the interests of all parties to a bond offering, especially the issuer and managers, that the financial information does not contain errors or omissions, which might lead to potential liability.

The due diligence defence

In broad terms, if the lead managers on a Rule 144A/Regulation S issue can successfully establish a "due diligence defence", they may be spared US liability for deficient disclosure in the offering document.[4]

A due diligence defence will require the relevant party asserting the defence to demonstrate that they were not negligent in the preparation of the offering document and that they took reasonable steps to confirm the accuracy of all statements of fact and opinion in the offering document, as well as all inferences which may be drawn from those statements, and that nothing material was omitted. In the US, managers can therefore assert a due diligence defence to liability if having taken such reasonable steps they did not know, and in the exercise of reasonable care could not have known, of a material misstatement or omission in the offering document.

Although not a specific defence for issuers, an issuer should find taking similar reasonable steps helpful in addressing claims of liability under Rule 10b5.

By comparison, there is no statutory liability for managers for deficient prospectus disclosure in the UK, as the UK regime focuses upon the issuer as the "person responsible for listing particulars". In relation to a prospectus for an LSE Main Market listing in the UK, a due diligence defence exists for an issuer in relation to the strict liability provisions of section 90 of FSMA if the issuer had a reasonable belief at the time the offering document was submitted to the FCA (and potentially for a period after that), having made such enquiries as were reasonable, that the statement was true and not misleading, or the matter omitted was properly omitted.[5] In relation to an offering document for a UK market listing other than on the LSE Main Market, where section 90A rather than section 90 of FSMA would apply, evidence of appropriate due diligence may help demonstrate a lack of recklessness in the preparation of the offering document.

It is therefore crucial that the financial information included in the offering document is properly checked as part of establishing a due diligence defence, where available, for issuers and managers. Managers are also highly aware of the potential reputational damage from being connected with a bond offering containing deficient disclosure, in addition to any possible concerns about a potential duty of care to investors.

3 For the purposes of this article, an offering with a Rule 144A component sold to US "Qualified Institutional Buyers".
4 This article does not consider public securities offerings in the US (i.e. SEC-registered offerings), in relation to which s11 of the Securities Act imposes strict liability on issuers.
5 FSMA Schedules 10 and 10A.

What comfort letter package does an independent auditor provide for an offering by a non-US issuer?

Offering to non-US investors

In an offering distributed solely to non-US investors (a Regulation S offering), the prevailing standard is the International Capital Markets Association (**ICMA**) standard forms of arrangement letter (which sets out the terms on which the comfort letter is delivered) and comfort letter. These documents can be found in the ICMA Primary Markets Handbook.

Arrangement letter

The ICMA standard form arrangement letter sets out the scope and limitations of the work to be performed by the relevant auditors in connection with a bond issue. It is addressed to the directors of the issuer and to the managers who have agreed, or will agree, to participate in the bond issue.

The arrangement letter will also include as an appendix the draft form of comfort letter(s) the auditors expect to be able to provide to the managers on delivery. However, the text of the final comfort letter (or letters) will ultimately depend on the results of the procedures performed by the auditors on the "cut-off" date (being the last day on which they are able to perform their procedures and finalise findings before delivering the relevant comfort letter). The cut-off date is generally anywhere between two and five local business days before the date the comfort letter is delivered.

Although the ICMA arrangement letter is an industry standard form, the relevant auditors will also append their standard terms and conditions to the arrangement letter. As each firm of auditors has a bespoke set of terms and conditions, the key terms can vary and are therefore frequently negotiated by managers' counsel. Any variations to the terms and conditions accepted by the auditors are then implemented via the arrangement letter and are often done by way of cross-reference to the terms and conditions.

Key points for managers to negotiate in relation to an auditor's standard terms and conditions:

- disapply payment of any fees and/or charges by the managers;
- disapply any cap on liability and/or indemnity from the managers in favour of the auditors;[6]
- disapply the restriction preventing non-solicitation of auditor employees due to the scale of manager entities and the number of trades they act on;
- disapply any limitation on the managers' ability to bring claims against the auditors beyond the statutory limitation period set out in the Limitation Act 1980 (i.e. six years);
- ensure that the comfort letter can be disclosed to the managers' professional advisers and affiliates, in the interests of resolving a dispute, in relation to court proceedings or as required by law, regulation or a regulatory authority; and
- ensure that the governing law aligns with the governing law of the subscription agreement.

6 It is, however, often provided that the auditor's liability may be limited to the proportion of actual damages caused by the auditor, where other parties also bear some liability for the same loss or damage. It is also not uncommon for the auditors' liability vis-a-vis the issuer to be limited.

Comfort letter

The comfort letter is addressed to the managers who have agreed to participate in the bond issue on the basis set out in the arrangement letter, and in the ICMA form of letter, also to the directors of the issuer. The final form of comfort letter customarily includes the following levels of comfort:

- **Financial information** *(the green and yellow sections in the diagram on the next page):*
  The auditors will confirm that they have delivered an audit or review report (as the case may be) on the historical financial information included in the offering document. The historical financial information included in the offering document and any other financial information extracted or derived from the issuer's accounts or accounting records will be covered by "extraction" comfort (i.e. the "tick and tie").
- **Changes in financial position** *(the blue sections in the diagram on the next page):*
  In relation to the period since the latest available audited or reviewed financials, the auditors will perform the following limited procedures:
  - reading the minutes of meetings of the issuer's management and audit committees to see if anything is mentioned that will be given accounting recognition in the next financials or which might impact the line items referred to on the next page;
  - reading the unaudited management accounts (usually the monthly management accounts) and comparing them to the prior year's management accounts for the corresponding period in order to identify any impacts on the line items referred to on the next page;
  - making enquiries of the "persons responsible for financial and accounting matters" at the issuer (usually the CFO) to ensure that any items identified as impacting the next financials from the reading of the minutes have been reflected in the latest management accounts and to ensure that the management accounts have been prepared in accordance with the issuer's usual accounting standards, as well as in a manner consistent with the latest audited accounts;
  - a comparison of certain line items from the most recent management accounts to the prior year management accounts for the same period (for profit and loss statement items) or to the most recent audited/reviewed accounts (for balance sheet items); and
  - a "negative assurance" statement that, apart from the findings reported in relation to the above procedures, "nothing came to our attention" to cause the auditors to believe that there were any adverse movements in the identified line items.
- **Stub period** *(the purple sections in the diagram on the next page):*
  Finally, in relation to the "stub period" beyond the latest management accounts in which there are no financial statements available at all (whether internal or not) and up to the relevant "cut-off" date, the auditors will:
  - read any further minutes of meetings that have become available from the issuer's management and audit committees;
  - make further enquiries of the "persons responsible for financial and accounting matters" at the issuer as to whether there have been any adverse movements in a more limited list of line items; and
  - give a "negative assurance" statement on this based on the responses received and the auditor's own reading of the minutes.

Beyond the relevant "cut-off" date, the comfort letter provides no comfort at all *(the red section of the diagram on the next page).*

The following diagram illustrates the decreasing levels of comfort, depending on the type of financial information available on which the auditors are performing their procedures:

Date	Level of Comfort
The end of the period to which the latest audited financials relate	Financial information comfort (full audit) and correct "extraction" comfort
The end of the period to which the latest unaudited (reviewed) interims relate (if any)	Financial information comfort (limited review) and correct "extraction" comfort
The end of the month to which the latest available management accounts relate (if any)	Change in financial position comfort (and correct "extraction" if such management account figures relevant)
The signing[7] cut-off date	Stub period comfort only
The date of the comfort letter delivered on signing	No comfort as at the signing date
The closing[8] cut-off date	Stub period comfort only[9]
The date of the comfort letter delivered on closing	No comfort

What line items are covered by the change in financial position comfort?

From the managers' point of view, more line item coverage is preferable, but only line items that are in the management accounts may be covered. Any line items in the management accounts that are particularly relevant to the issuer's business and prospects should be covered. At a minimum, the managers should generally request coverage on key revenue and profit/loss line items, as well as key balance sheet line items, if available. These vary considerably deal to deal, based on the nature of the issuer and the level of detail available in management accounts. As a result it is important that the business and legal teams of the managers work closely together in ensuring that the line items provide an appropriate level of coverage to the managers, taking into account the nature of the issuer's business and other relevant considerations.

In the stub period, the line items covered are of necessity very limited and are often restricted to the auditors confirming with the person responsible for financial and accounting matters that there have been no adverse changes in a very limited list of certain key line items, often simply items such as share capital, cash and cash equivalents, and non-current borrowings, although, again, it will be dependent upon the nature of the issuer and what information the person responsible for financial and accounting matters has available.

7 Signing is when the subscription agreement is signed and the final offering document is published.
8 Closing is when the bonds are issued and net proceeds are paid to the issuer.
9 In order to deliver the comfort letter on closing, the cut-off date is brought forward and the stub period procedures are performed again.

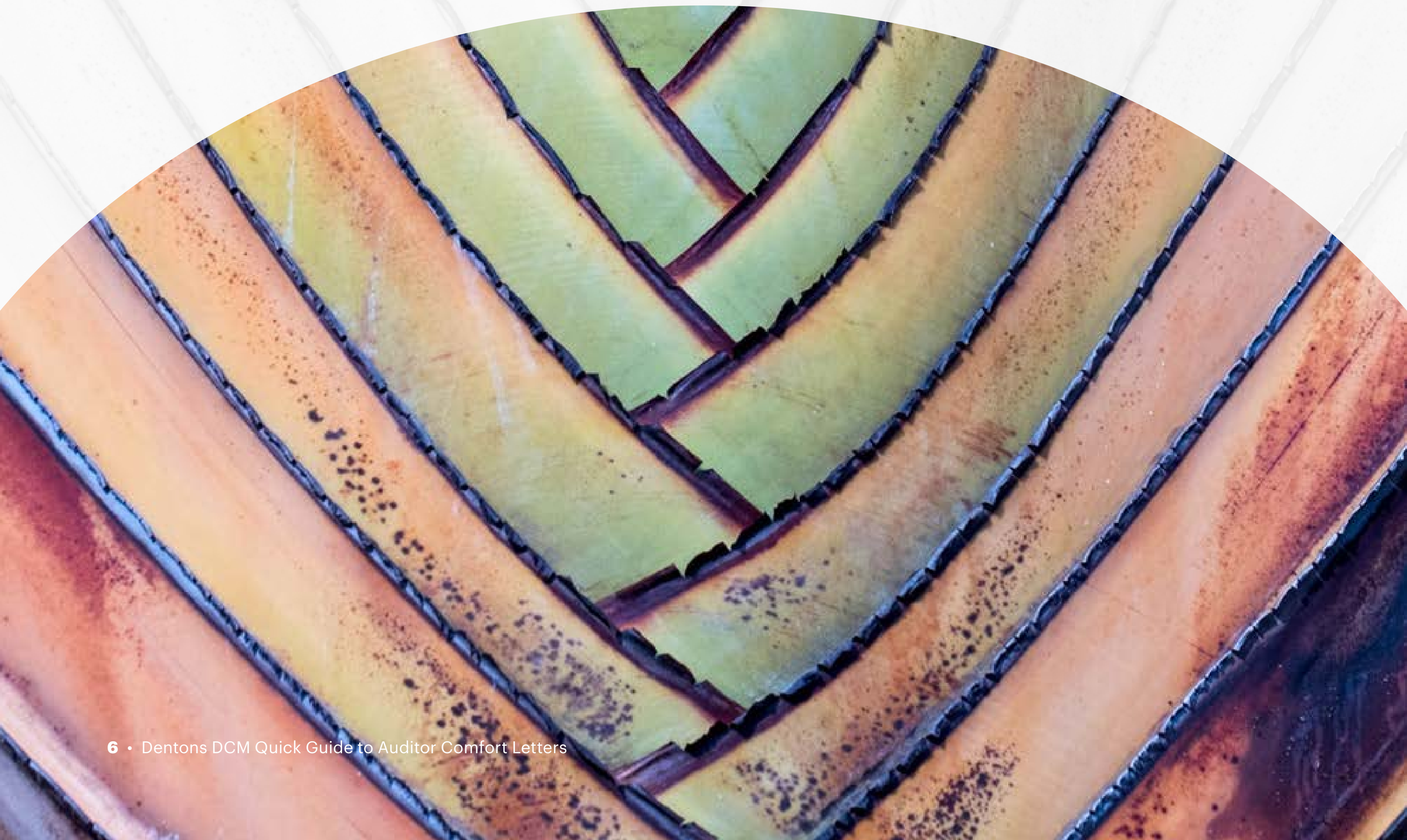
What is the “circle-up” (or “tick and tie”) and what if the auditors do not cover all the numbers?

The auditors will read the financial information included in the disclosure as part of their processes and compare it to the relevant audited financial statements and any unaudited interim financial statements or accounting records of the issuer. The auditors should then confirm that certain figures identified by way of a “circle-up” (i.e. circled in a PDF of the extracted disclosure) have been accurately extracted or derived from their respective sources, or have been accurately calculated. The “circle-up” should also cover any documents incorporated by reference into the offering document (other than the audited or reviewed financials themselves).

“Tick and tie” is the colloquial term for this process – the auditors provide a tick mark for financial information identified in the circle-up that ties back to its source or calculations.

Whilst the “tick and tie” helps the issuer (and the managers where relevant) assert a due diligence defence, the auditors cannot comfort information that is not purely financial in nature, or financial information that does not ultimately tie back to either the audited financial statements, any unaudited interim financial statements or accounting records of the issuer. It has therefore become common practice for certain additional financial or quasi-financial information that the auditors cannot comfort, and that the managers conclude is not adequately addressed through other aspects of the due diligence process, to be specifically confirmed by the issuer itself through an officer’s certificate.

An officer’s certificate is addressed to the managers only, is signed by an individual with sufficient seniority within the issuer’s finance team (e.g. the CFO) and confirms that information identified in a separate circle-up appended to the officer’s certificate also ties back to its source or calculations. In addition to a representation in the contractual documents that the offering document is true, accurate and not misleading, this gives the managers comfort that the relevant items which were not comforted by the auditors have been actively checked by the issuer.



Rule 144A/Regulation S offering to non-US investors and US QIBs

On a Rule 144A/Regulation S offering, auditor comfort letters are often colloquially referred to as "SAS 72" letters. SAS 72 is a reference to a now outdated US auditing standard, with the requirements for comfort letters now contained in the Public Company Accounting Oversight Board's (the **PCAOB**) standard AS 6101, applicable to SEC reporting companies, and the Auditing Standards Board of the American Institute of CPAs (**AICPA**) standard AU-C Section 920, which applies to non-SEC reporting companies (and therefore most Rule 144A/Regulation S offerings within the scope of this article).

The standards contain forms of letters and wording variations covering various circumstances. The considerations for negotiating the forms of letters and the auditor's terms of business are largely the same as those applicable to comfort letters in Regulation S offerings. However, it is important to note that in a Rule 144A/Regulation S offering the auditor will in most cases deliver two comfort letters, which should be largely identical in the contents of the comfort provided, save that the "US" comfort letter (often referred to as the "SAS 72 letter") is for use in connection with the Rule 144A portion of the offering, and the "non-US" comfort letter (often referred to as the "SAS 72 look-alike" letter) is for use in connection with the Regulation S portion of the offering. The arrangement letter with the managers will also relate solely to the non-US portion of the offering. The specific formulation of the use limitation will vary between audit firms; the key consideration is to ensure that, together, the letters cover the entire global offering.

The managers' representation letter

Pursuant to AU-C Section 920, in order to provide the "US" comfort letter the auditors must receive a representation letter from the managers receiving the comfort letter that confirms that the managers' review process, applied to the information relating to the issuer of the securities, is substantially consistent with the due diligence review process that the managers would perform if the placement of the securities were being registered pursuant to the Securities Act.

While this is normally not an issue for those managers who have been involved in the full process of preparing for and diligencing the bond issue, as they will have performed the appropriate documentary, management, legal and other due diligence to enable them to establish their due diligence defence to any 10b-5 liability, this may sometimes give rise to concerns for managers who have joined the syndicate later in the process, such as co-managers (that are often brought into a transaction in a "passive" role where they do not actively contribute to the bookbuilding process and do not actively find investors in the bonds, but nevertheless bear the same potential legal liability for deficient disclosure as other managers). If co-managers have been brought into the transaction late in the process and after the management and documentary due diligence exercise has concluded, they may need to perform additional steps to be in a position to sign a management representation letter stating that they have conducted due diligence substantially consistent with that which would be performed on an SEC-registered deal. Possible additional steps may include: (i) requesting copies of the management due diligence questions and documentary due diligence request list; (ii) asking questions of the managers' legal counsel about how key diligence issues were addressed in the disclosure; (iii) reading the offering document; and (iv) asking any outstanding diligence questions of the issuer.

If a manager is unable to provide the representation letter, the auditor will not be able to deliver a US comfort letter containing negative assurance to that manager. For example, the auditor may instead provide an "agreed upon procedures" only form of letter, previously known as a "SAS 76" letter.

When are comfort letters delivered?

Generally, comfort letters are delivered on signing and a "bring-down" letter is issued on closing.

At the time the preliminary prospectus is shared, also referred to as the "red" or "red herring" (i.e. a draft of the offering document shared with investors for marketing purposes that omits certain "pricing" information relating to the bond issue (like the price and size of the offering)), it is unusual for the auditors to have completed their cut-off date procedures. However, the wording of the arrangement and comfort letters (absent the auditor's findings and subject to any completion or amendment required by the cut-off date procedures), the scope of the "circle-up", and any officer's certificate, should have been agreed. So, although the managers will not have been given comfort on any changes in the issuer's financial position since the last audited/reviewed financial statements, they can be confident that the financial information contained in the offering document and identified by way of a "circle-up" has been accurately extracted or derived from its source or calculations.

Even though the managers won't have auditor comfort on any changes in the issuer's financial position since the last audited/reviewed financial statements at the time the preliminary prospectus is shared, the managers' other due diligence procedures should have placed them in a position where they are comfortable launching the transaction. After the cut-off date when the final auditor procedures are performed, the managers should ensure that the auditor's findings match their own expectations from due diligence, and are consistent with the prospectus disclosure.

The 135-day rule

Originally a rule contained in the old SAS 72 US auditing standard, this is now applied in AU Section 920 by AICPA, and in AS 6101 by the PCAOB, and thus is technically applicable to Rule 144A/ Regulation S bond offerings.[10] In situations where the auditors are applying the 135-day rule, if a comfort letter is requested 135 days or more after the later of (i) the last day of the financial period subject to the auditor's last audit of the issuer's financial statements or (ii) the last day of the financial period subject to the auditor's last review of the issuer's interim financial statements in accordance with ISRE 2410 (or equivalent), then the auditor will not provide a "negative assurance" comfort letter, but will instead only provide an "agreed upon procedures" letter, lacking any negative assurance confirmations and instead simply reporting on the procedures performed and the findings obtained.

As it is customary for managers to require a "negative assurance" comfort letter in order to proceed with a bond issue, for a Rule 144A/Regulation S bond offering,[11] where an issuer has a 31 December year end, and no later AU Section 722 reviewed interims, then 14 May (in a non-leap year) will usually be the last day (i.e. the cut-off day) as of which the auditor may provide negative assurance in the comfort letter.

An AU Section 722 review of the first quarter interims of 31 March for such an issuer will extend the last possible cut-off day up to which the auditor may provide negative assurance in the comfort letter until 14 August.

10 Some auditors do attempt to apply a 135-day rule to certain Regulation S bond issues, so it is worth checking early on, even on Regulation S only bond issues, whether the issuer's auditors will have any problem with delivering a negative assurance comfort letter if the envisaged timing of the bond means that the comfort letter will be required after the 135th day.

11 Or where the auditors are applying a 135-day rule to a Regulation S bond offering.

The auditor's involvement in other due diligence

It is customary on Rule 144A/Regulation S bond issues, and occasionally also on emerging market Regulation S bond issues, for the managers to determine that a necessary part of their due diligence exercise is to ask questions of the auditors, in addition to asking them to provide comfort letters. The questions to auditors usually focus on whether there have been any disagreements between the auditors and the issuer on how the issuer has applied accounting standards and policies and whether there are any factors that have emerged during the general process of the audit that would be material for the managers in the context of the bond issue. Before they participate in any such due diligence question and answer sessions, the auditors may insist that the managers execute the arrangement letter, containing appropriate protective provisions, prior to the due diligence call or meeting. Alternatively, the auditors may issue a comparable notification to the managers, or in some cases require execution of a "hold harmless" letter, acknowledging that the managers are not entitled to rely on the auditor's responses, that the auditor has no liability to the managers in relation to the auditor's responses, and that the managers will hold the auditor harmless against any claims asserted against the auditor as a result of or arising out of the auditor participation in the due diligence question and answer session.

Special Situations

What if the issue is guaranteed?

If the bond issue is guaranteed, there are a few additional considerations for an issuer, the managers and the auditors. For example, if the guarantor is a parent company and the issuer is a consolidated subsidiary of that parent, the offering document would usually contain the guarantor's financial information (i.e. the consolidated financial information of the group), so the arrangement and comfort letter will be delivered by the guarantor's auditors (and no separate comfort letters would be required in respect of the issuer). In some cases, separate arrangement and comfort letters in respect of the issuer and the guarantor may be required, especially if the offering document separately presents the issuer's and the guarantor's financial information and the issuer is audited by a different firm to the guarantor, or even if audited by the same firm, located in a different jurisdiction to the guarantor. Managers should be conscious of any additional time requirements to negotiate multiple arrangement and comfort letters with different auditors.

Change of Auditors

A change in auditors of the issuer can lead to additional complexities. For example, if we assume that the offering document will include (either directly, or incorporated by reference) financial information from the financial statements of the issuer for: (i) the year ended 31 December 2022, which were audited by the issuer's current firm of auditors; and (ii) the year ended 31 December 2021, which were audited by a previous firm of auditors, the issuer's current auditors may not, as a matter of policy, be willing to give extraction comfort on the accuracy of the financial information contained in the offering document from the year that they did not carry out a full audit. Further complications may arise if the change in auditors has occurred subsequent to the completion of the most recent annual audit (i.e., in connection with preparation of interim financial information).

Where there has been a change in auditors, managers should request their issuer client to engage with their auditors as early as possible in the preparation process for a bond issue to ensure that the negotiation of the arrangement and comfort letter is not an unduly protracted process. Generally, the managers have two options when auditors have changed in the period covered by the financial information included in the offering document:

- negotiate two separate arrangement and comfort letters with each set of auditors. However, this can be costly and time-consuming unless it has been agreed in advance during the auditor rotation procurement process; or

- negotiate one arrangement and comfort letter with the issuer's current auditors. To the extent that the current auditors refuse to give extraction comfort on the accuracy of numbers extracted or derived from the financial statements for the years prior to their audit work commencing and the scope of their circle-up therefore being limited, the managers may agree for the relevant figures to instead be covered by an officer's certificate (usually on the understanding that this does not set a precedent for how extraction comfort should be provided for the issuer's future deals).

Pro Forma Reports

The inclusion of pro forma financial information in the offering document can create an additional layer of complexity when it comes to the preparation of comfort letters. Where pro forma financial information is included within an offering document to illustrate the effect of an acquisition, merger or sale,[12] the managers will require comfort on all the financial information contained in the offering document, including the target and pro forma financial information. In circumstances where the auditors for the issuer and the target are the same, the issuer's auditors may be willing to provide comfort on the target's financial information. However, where the auditors are different, a separate comfort letter from the target's auditors may be needed, and/or the company's auditors may need to engage in additional procedures in order to provide the required level of comfort on the pro forma financial information (particularly in connection with a Rule 144A/ Regulation S offering). In this scenario, the issuer would also need to consider the cost implications of engaging another set of auditors, and the managers would need to factor in the timing impact of negotiating two sets of auditor comfort and arrangement letters.

In the absence of auditor comfort on the target's historical financial information included in the prospectus, an issuer may ask the target's CFO to cover the target's financial information in a CFO certificate. If the target is unwilling to provide such comfort directly to the managers, an issuer may consider providing comfort that the target's financial information has been correctly extracted from the target's published financials within its own officer's certificate. Ultimately, the best approach will depend on timing constraints, the specific fact pattern of a transaction and the relationship between the issuer and the target.

The comfort letter as a shield not a sword

A crucial plank in the issuer's and the managers' due diligence on a bond transaction, and a key tool to ensure that financial disclosure in the offering document is accurate and does not omit recent material financial developments, the auditors comfort letters and the negotiation of the comfort letter and any related arrangement letters, can be a lengthy process. It is therefore always advisable to bring the issuer's auditors on board as early as possible in a transaction.

It should be remembered that the primary purpose of an auditor comfort letter is to assist the managers and the issuer in getting comfort that the financial disclosure in an offering document is accurate and does not omit recent material financial developments, through the auditors, as the most appropriate accounting experts, providing extraction comfort, change in financial position comfort and stub period comfort, on a negative assurance basis. The comfort letter is not primarily intended to be a basis for rights to claim against, or to receive indemnification from, the auditors. In short, a comfort letter should be viewed as a shield, offering protection (via the due diligence defence and accurate disclosure) to the managers and the issuer, rather than a sword with which to "attack" auditors.

This Quick Guide is 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.

12 For more information, please see our Quick Guide article on pro forma financial information: https://www.dentons.com/en/insights/articles/2022/september/1/dentons-dcm-quick-guide-to-pro-formas.

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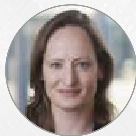

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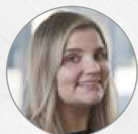

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