"Non-Boycott" clauses pose a serious risk to bondholder Co-Operation Agreements

The European Leveraged Finance Association (ELFA) has witnessed a worrying negative development in bondholder negotiation and bond documentation stemming from Warner Brothers Discovery's (WBD) recent decision to split its business. Concurrent with the announced split, WBD and its advisers launched a tender and consent solicitation to its bondholders. Both the timeline and substance of these transactions concern ELFA.

First, this was a complex multi-stage transaction across the entire capital structure with material downside risk on contractual subordination and debt tender economics for those debtholders who did not participate. However, the deadline for consents on which all sub-sequent tender economics and contractual options were dependent was a mere 5 days. When internal deadlines are factored in this was, in reality, only a 3/4-day window at best for most investors. This did not give investors sufficient time to aggregate all the necessary information and then analyse or organise in relation to the offer and solicitation. ELFA therefore believes that this was a tender and consent process that was expressly designed to be coercive in nature.

Second, the consent was not only for the removal of key covenants but also the insertion of "non-boycott" language into the indentures in relation to co-operation or lock-up agreements. Specifically, the amended indentures would prohibit debt holders from participating in any co-operation agreement that contained restrictions on signatories purchasing newly issued debt for cash from WBD. These two restrictive mechanisms are the means by which co-operation agreements effectively block value-destructive "drop-down" and non-pro rata "uptier" transactions. Hence "non-boycott" language would, to all intents and purposes, eviscerate any bondholder co-operation agreement by mandating their omission if WBD bondholders were going to be able to participate. ELFA therefore believes that the introduction of any type of language restricting the ability of bondholders to act is a negative development in bond documentation. It would not view the inclusion of any language attempting to prevent co-operation or lock-up agreements, whether cloaked in "non-boycott" terms or otherwise, in new issuance as an acceptable norm.

We encourage our members to reject any such proposed bond documentation and reflect this view to both issuers and syndicate desks.

About ELFA

The European Leveraged Finance Association (ELFA) is a buyside-only trade association comprised of European investors and non-bank lenders in the high-yield, leveraged loan, CLO and private debt markets. Its membership consists of more than 60 institutional fixed income managers, including investment advisors, insurance corporates and pension funds. ELFA seeks to support the growth and resilience of the leveraged finance market while acting as the voice of its lender community by promoting transparency and facilitating engagement among leveraged finance market participants.. For more information, please visit ELFA's website: www.elfainvestors.com.

European Leveraged Finance Association
35 Ballards Lane, London N3 1XW
T +44 (0)7725 353149
E elfa@elfainvestors.com

European Leveraged Finance Association