

SOLICITING AND TABULATING VOTES on Chapter 11 Plans from Holders of Publicly Traded Securities

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Today, nearly all securities around the world are held electronically at various clearinghouses, including The Depository Trust Company (DTC), Euroclear, and Clearstream International SA. Electronic holding facilitates efficient, immediate, cost-effective, and anonymous trading and contributes to the liquidity of securities; however, such electronic trading and holding of securities present issues for a debtor soliciting votes on its Chapter 11 plan in a U.S. bankruptcy proceeding.

The Role of Depositories

Traditionally, paper stock or bond certificates (certificated securities) were used to evidence ownership of securities. Trades of certificated securities generally required that they be submitted to a third party, such as a transfer agent or an indenture trustee or an agent thereof, who would execute and settle the trade and reflect the new ownership of the securities on its ledger. To avoid this cumbersome paper process, following the advent of the computer, central securities depositories such as DTC, Clearstream, and Euroclear were formed to provide the electronic platforms upon which these securities (non-certificated securities) could be held and to serve

as clearinghouses for electronic trades thereof. This article focuses on U.S. securities held through DTC.

To have its debt or equity securities widely held and seamlessly traded electronically, a company causes a “global” security (be it a stock certificate, warrant, note, bond, etc.) to be deposited at one of the depositories, which credits the appropriate number of shares, notes, or bonds to the applicable participating bank or broker, often called a nominee. Nominees, in turn, hold the electronic securities “in street name” for their clients, the persons or entities, known as “beneficial holders,” with the true economic interest in the applicable securities. The trading of electronic, non-certificated securities among participating nominees is tracked, cleared, settled, and recorded by the depository, which credits or debits the nominee’s account with the depository accordingly.

Electronic trading of non-certificated securities is much less cumbersome than the manual and labor-intensive process required for certificated securities and is a tremendous multiplier of liquidity and value in securities markets. However, the near-

complete lack of transparency as to the identities of the beneficial holders of such electronically traded, non-certificated securities creates issues, albeit not insurmountable issues, for a debtor soliciting and tabulating votes on a plan in bankruptcy.

Because, with rare exceptions, a debtor is not privy to the identities of the beneficial holders of its non-certificated securities, the debtor cannot communicate or coordinate with such holders directly. Rather, to communicate with holders of securities issued in the U.S., a debtor must first obtain from DTC a “securities position report” (SPR), which lists the nominees that are the holders of record of the subject securities. Then, the debtor will coordinate outreach to beneficial holders of the securities through those holders’ nominees. This two-step process is at the crux of soliciting holders of publicly traded securities.

Voting in Chapter 11 Proceedings

Granting creditors or interest-holders with impaired claims or interests the

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right to vote on a proposed plan and the treatment of their claims thereunder is a foundational aspect of the Chapter 11 process. For most claims or interests not based on publicly traded securities, soliciting votes and tabulating ballots is relatively straightforward. Information regarding such claims, including the corresponding claimholder data, resides on a regularly updated, detailed, and transparent claims register that reflects the current ownership of all such claims in the bankruptcy proceeding.

To accomplish the solicitation of these non-securities-based claims, a debtor—with the court’s approval—sets a record date and sends a copy of the plan and disclosure statement, a ballot, and/or voting instructions directly to the holders that appear on the claims register as of the record date. A debtor can also contact non-securities holders directly with any updates to the solicitation timetable and deadlines and any further clarifications of the voting procedures.

Conversely, because the identities of the beneficial holders of the debtor’s publicly traded securities cannot be ascertained by the debtor, an effective solicitation of that population requires considerably more foresight and effort than is standard in the non-securities solicitation model. To serve the efficacy of solicitation and reliability of tabulation, the debtor must (i) allot sufficient time for the layers of coordination necessary for nominees to disseminate solicitation materials to their beneficial holder clients and then collect, transcribe, and submit such votes from such clients to the debtor’s solicitation agent, (ii) make available a two-step process, which reliably determines whether a class of securities holders has accepted or rejected the plan while maintaining the anonymity of participating beneficial holders, and (iii) provide clear instructions to all parties to the process, most especially nominees and beneficial holders.

Sufficient Time. Critically, solicitation planning must allocate sufficient time for holders of publicly traded securities and their nominees to complete the process. Because the debtor is not in direct contact with beneficial holders of its non-certificated securities, the debtor must rely on nominees (or such nominees’

agent) to receive, process, and then forward voting materials to their beneficial holder clients at the outset of the solicitation period. Acting in this representative capacity on behalf of its beneficial holder clients requires that a nominee (or such nominee’s agent) engage in various critical (and sometimes time-consuming) tasks, including assembling, labeling, and distributing solicitation packages; summarizing the contents thereof; and/or crafting voting instructions that faithfully express the nature and specific requirements of the event. These labor- and time-intensive tasks and corresponding time constraints must be deliberately accommodated in the debtor’s plans for solicitation.

The conclusion of the solicitation process makes similar administrative demands of nominees (or such nominees’ agent) that must collect and compile the votes of their beneficial holder clients and transcribe the votes onto a master ballot. For the vast majority of solicitations, a master ballot is the only means by which nominees can communicate the individual plan votes they are responsible for tabulating and said master ballots must be received by the debtor’s solicitation agent before the voting deadline.¹

For these reasons, it is customary to see voting periods of roughly 28 to 35 days for securities-based solicitations,² though a debtor’s particularly complex capital structure or other practical case considerations may demand a longer period,³ and exigent circumstances may support a debtor’s request that the court authorize a shorter voting period.⁴ Perhaps recognizing the complexity of a prepack case involving publicly traded securities, the Southern District of New York’s procedural guidelines require debtors in such circumstances to provide beneficial holders at least a “twenty (20) business day voting period.” Suffice it to say that, as a general rule, a debtor is best served by baking the longest voting period possible into its solicitation scheme.

Two Forms of Ballots. Because the solicitation process must accommodate the solicitation of votes from beneficial holders through nominees (or such nominees’ agent), debtors typically craft two forms of ballots—a beneficial holder ballot and a master ballot. The beneficial holder ballot is designed for use by the beneficial holder to transmit its vote to

the nominee, which, in turn, includes and certifies such vote along with votes submitted by the nominee’s other beneficial holder clients on a master ballot sent to the solicitation agent.

Master ballots do not require nominees to identify their beneficial holder clients by name; rather, nominees are instructed to identify their participating clients by account number or some other internal identifier. Most often, nominees create these identifiers expressly for the plan vote so that individual votes can be properly recorded and tracked without revealing any confidential beneficial holder name or account information. The master ballot does, however, require that nominees present their DTC participant number, the inclusion of which enables the debtor’s solicitation agent to reconcile the votes tabulated in the master ballot against the nominee’s securities position as presented in the SPR to ensure the aggregate of beneficial holder votes does not exceed the nominee’s voting record date position with DTC in the subject securities.

Clear Instructions. Because of the layered ownership structure of publicly traded securities, which necessitates the debtor’s reliance on nominees as intermediaries between the debtor and beneficial holders in the solicitation process, a debtor must take particular care to ensure that solicitation procedures are communicated with great clarity and precision to nominees. Such care is especially important because solicitation-related communications are ultimately aimed at beneficial holders with whom the debtor has no direct contact and because retail bond holders, who are often a key component of a successful solicitation and may lack the sophistication of institutional beneficial holders, can find the plan vote a daunting prospect.

As an essential matter, a debtor must make certain that beneficial holders understand their votes are to be transmitted according to their nominee’s instructions and not delivered to the debtor or the debtor’s advisors. Moreover, debtors are best served by allowing nominees to employ their customary methods of interacting with beneficial holders regarding all phases of the solicitation process, from disseminating information that beneficial holders

rely on to make an informed decision whether to vote for or against the plan to the manner in which votes are collected and tabulated. Such customary practices may include the use of email, telephone, or a dedicated electronic platform for conveying information and providing access to documents and/or collecting votes.

Finally, a debtor must ensure that the nominee and its beneficial holder clients are made aware that the voting deadline applies to the nominee's submission of the master ballot to the debtor's solicitation agent, such that the nominee must inform its holders of whatever earlier internal voting deadline will provide the nominee sufficient time to prepare and timely return its master ballot. This internal voting deadline set by the nominee is another critical piece of the solicitation process, like so many others involving the solicitation of votes from beneficial holders of publicly traded securities, over which the debtor can exercise little to no control beyond crafting instructions that are as clear and explicit as possible.

Conclusion

Non-certificated securities, which promote liquidity and enhance value outside of bankruptcy, present significant challenges to debtors soliciting votes on a Chapter 11 plan—mainly arising from the debtor's lack of privity with the beneficial holders of such securities. Since the solicitation of votes from beneficial holders of publicly traded securities is often the cornerstone of a debtor's efforts to confirm its plan, it is important for debtors to optimize the solicitation process devoted to such holders.

Debtors can do so by (i) allotting sufficient time for the layers of coordination necessary for dissemination of solicitation materials through nominees to beneficial holders and the collection and tabulation of votes submitted by nominees on behalf of their beneficial holder clients; (ii) making available a two-step process, which reliably accomplishes plan voting while maintaining the anonymity of participating beneficial holders; and (iii) providing clear instructions to all parties to the process. ■

¹ Solicitation procedures will also customarily accommodate the alternative of a nominee "pre-validating" a ballot for its beneficial holder clients, though such pre-validation is not commonly used. To pre-validate a



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ballot, a nominee is required to insert the voting amount for its beneficial holder client and certify such client's holding on the ballot before the nominee forwards the ballot to the beneficial holder. The nominee then instructs the beneficial holder to complete and submit the pre-validated ballot directly to the debtor's solicitation agent.

² See *In re: EP Energy Corporation, et al.*, Case No. 19-35654 (MI) (Bankr. S.D. Tex.) (28 days); *In re: Exide Holdings, Inc., et al.*, Case No. 20-11157 (CSS) (Bankr. D. Del.) (29 days); *In re: The Hertz Corporation, et al.*, Case No. 20-11218 (MFW) (Bankr. D. Del.) (32 days); and *In re: Claire's Stores, Inc., et al.*, Case No. 18-10584 (MFW) (Bankr. D. Del.) (35 days). These stated voting periods in endnotes 2, 3, and 4 were the periods approved by the courts in each of the applicable cases. In many instances, the actual voting periods were ultimately extended at the discretion of the debtor.

³ See *In re: The Financial Oversight and Management Board for Puerto Rico as representative of The Commonwealth of Puerto Rico, et al.*, Case No. 17-BK-3283 (LTS) (D.P.R.) (35 days, extended by court order to 49 days); *In re: iHeartMedia, Inc., et al.*, Case No. 18-31274 (Bankr. S.D. Tex.) (42 days, extended by court order to 49 days and at counsel's direction to 62 days); and *In re: Nine West Holdings, Inc., et al.*, Case No. 18-10947 (SCC) (Bankr. S.D.N.Y.) (54 days).

⁴ See *In re: PHI, Inc., et al.*, Case No. 19-30923 (Bankr. N.D. Tex.) (21 days); *In re: 24 Hour Fitness Worldwide, Inc., et al.*, Case No. 20-11558 (KBO) (18 days) and *In re: Sanchez Energy Corporation, et al.*, Case No. 19-34508 (MI) (Bankr. S.D. Tex.) (14 days).



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