

CLIFFORD CHANCE

INTERNATIONAL REGULATORY UPDATE 28 MARCH – 1 APRIL 2022

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EU Commission publishes anti-greenwashing proposal

The EU Commission has published a [proposal](#) for a directive to amend the Consumer Rights Directive and Unfair Commercial Practices Directive (UCPD) with the aim of, among other things, strengthening consumer protection against misleading environmental claims and banning certain greenwashing practices.

Proposed amendments to the UCPD that are of potential relevance to financial services include prohibiting:

- practices which make misleading claims as to the environmental or social impact of a service;
- making an environmental claim related to future environmental performance without clear, objective and verifiable commitments and targets and an independent monitoring system; and
- advertising benefits for consumers that are considered as a common practice in the relevant market.

The directive also proposes to regulate the provision of comparability assessment tools, including those that provide information on sustainability, and to extend the list of commercial practices considered unfair in all circumstances to include, among other things:

- displaying a sustainability label which is not based on a certification scheme or not established by public authorities;
- making a generic environmental claim for which the trader is not able to demonstrate recognised excellent environmental performance relevant to the claim; and
- making an environmental claim about the entire product when it actually concerns only a certain aspect of the product.

Platform on Sustainable Finance publishes extended environmental taxonomy final report

The Platform on Sustainable Finance has published its final [report](#) on taxonomy extension options supporting a sustainable transition. The report was commissioned in response to the EU Commission's request for advice from the Platform on possible extensions of the EU taxonomy on green and

sustainable finance and relates primarily to Article 26.2(a) of the Taxonomy Regulation. Its purpose is to inform the Commission, capital markets, companies and other economic actors and stakeholders on the ways in which an extended environmental taxonomy can become a taxonomy for transitioning the whole European economy.

The Platform has recommended that:

- the environmental ('green and sustainable') taxonomy is extended with a focus on activities supporting urgent environmental transition;
- key parts of an extended taxonomy are defined;
- further economic activities with no technological possibility of improving their environmental perform are identified; and
- the taxonomy is extended with a transition focus and with coherent supporting policies.

ESMA publishes final report on EU carbon market

The European Securities and Markets Authority (ESMA) has published its final [report](#) on the EU carbon market. The report analyses the trading of emission allowances (EUA) and emission allowance derivatives. In looking at trading in carbon markets and counterparties in this market, ESMA identified the following:

- long positions in carbon derivatives are mainly held by non-financial entities for hedging purposes;
- short positions are mainly held by banks and investment firms providing liquidity and carbon financing;
- positions by investment funds remain limited, with positions principally held by third-country funds; and
- the share of high-frequently and algorithmic trading is significant in the carbon market, even if the relevant firms are only holding very small or no actual positions.

A number of policy recommendations to improve market transparency and monitoring have been put forward. These include but are not limited to:

- extending position management controls to EUA derivatives;
- amending EUA position reporting;
- tracking chain of transactions in MiFIR regulatory reports; and
- providing ESMA with access to primary market transactions.

MiFID2/MiFIR Review: ESMA publishes final reports on transparency requirements and sets out next steps

ESMA has [published](#) two final review reports proposing targeted amendments to regulatory technical standards (RTS) on equity transparency (RTS 1) and non-equity transparency (RTS 2) under MiFIR.

The final reports, which are intended to be a first step in ESMA's review of RTS 1 ad RTS 2, set out amendments that received broad support from stakeholders and / or are considered important in the context of establishing a consolidated tape provider (CTP).

ESMA intends to carry out a second, broader review focussing on changes as a consequence of the wider MiFIR review currently under discussion. This

second review will also include analysis of proposals included in the July 2021 consultation paper on transparency requirements not covered in the final reports.

ESMA has submitted the reports to the EU Commission, which has three months to decide whether to endorse the proposed amendments.

MiFIR: ESMA delays RTS 2 annual review

ESMA has [announced](#) its decision to postpone the annual review of RTS 2.

ESMA has decided to delay the review, which assesses whether it is appropriate to move to the next stage of the phase-in for the liquidity determination of bonds and for the trade percentiles determining the pre-trade sizes specific to the financial instrument (SSTI) threshold for bonds and derivatives, due to:

- the on-going MiFIR review, which is likely to propose the removal of the SSTI threshold and might impact other provisions related to non-equity financial instruments; and
- elements of the previous phase-in not yet being fully implemented and in force.

ESMA intends to resume the submission of the annual RTS 2 report in 2023.

MiFIR: ESMA publishes final report on management body of DRSPs

ESMA has published a final [report](#) setting out RTS on the management body of data reporting service providers (DRSPs) under MiFIR.

The final draft RTS build on existing ESMA guidelines on the management body and set out the criteria for the assessment of the suitability of the members of DRSP management bodies, taking into account the different roles and functions carried out by them and the need to avoid conflicts of interest between members and users of the DRSP.

The report has been submitted to the EU Commission for adoption, which has three months to decide whether to endorse the draft RTS.

MiFID2: ESMA publishes remuneration guidelines

ESMA has published a final [report](#) on guidelines on certain aspects of the MiFID2 remuneration requirements.

The guidelines build on, and will replace, existing 2013 guidelines and seek to enhance clarity and foster convergence in relation to the MiFID2 remuneration framework, including requirements and rules covering conflicts of interest, conduct of business and governance.

The guidelines will apply six months following their publication on ESMA's website in all official EU languages.

EMIR/SFTR: ESMA publishes final guidelines on data transfer between trade repositories

ESMA has published its final [report](#) on guidelines on transfer of data between trade repositories (TRs) under the European Market Infrastructure Regulation (EMIR) and the Securities Financing Transactions Regulation (SFTR).

The report contains two sets of guidelines. The first consist of amendments to ESMA's existing guidelines on the transfer of data between TRs under EMIR.

It also introduces new guidelines including porting only outstanding reports that have been updated to the latest reporting requirement under the voluntary porting; in the case of withdrawal of registration, the porting of reconciliation and rejection data generated by the TR, the storage of non-outstanding data of lower quality in separate databases and receiving a fee for non-outstanding data from active clients.

The second set of new guidelines relate to SFTR reporting requirements in the context of porting to set up a framework to enable market participants to safely transfer data from one TR to another.

The report also summarises the feedback received on ESMA's public consultation on the draft guidelines.

The guidelines are applicable from 3 October 2022.

EMIR: ESMA updates recognition of third-country CCPs

ESMA has [announced](#) a series of updates on the recognition of central counterparties (CCPs) established in third countries (TC-CCPs) under EMIR.

According to the statement, ESMA has:

- completed the tiering and review of the recognition decisions of 25 TC-CCPs under Articles 25 and 89(3c) of EMIR;
- recognised for the first time the National Securities Clearing Corporation (NSCC) which is authorised and supervised by the US Securities and Exchange Commission (SEC) as a Tier 1 CCP under Article 25 of EMIR; and
- concluded modified or new MoUs with the relevant third country authorities to reflect key amendments to EMIR.

CCPs: ESMA signs memoranda of understanding with financial authorities in various third countries

ESMA has [published](#) fifteen memoranda of understanding (MoUs) that it has signed with financial authorities relating to CCPs established in the related jurisdictions.

ESMA has signed MoUs with:

- the Reserve Bank of Australia (RBA) and the Australian Securities and Investments Commission (ASIC) relating to CCPs established in Australia;
- Banco Central do Brasil (BCB) and Comissão de Valores Mobiliários (CVM) relating to CCPs established in Brazil;
- the Ontario Securities Commission (OSC) and the Autorité des marchés financiers of Québec (AMF) relating to CCPs established in Ontario and Québec;
- the Alberta Securities Commission (ASC) relating to CCPs established in the province of Alberta;
- the Dubai Financial Services Authority (DFSA) relating to CCPs established in the Dubai International Financial Centre (DIFC);
- the Securities and Futures Commission (SFC) relating to CCPs established in Hong Kong;
- the Financial Services Agency of Japan (JFSA) relating to CCPs established in Japan;

- the Ministry of Agriculture, Forestry and Fisheries of Japan (MAFF) and Ministry of Economy, Trade and Industry of Japan (METI) relating to CCPs established in Japan;
- the National Banking and Securities Commission (CNBV) relating to CCPs established in Mexico;
- the Reserve Bank of New Zealand (RBNZ) and the Financial Markets Authority (FMA) relating to CCPs established in New Zealand;
- the Financial Services Commission (FSC) and the Financial Supervisory Service (FSS) relating to CCPs established in the Republic of Korea;
- the Monetary Authority of Singapore (MAS) relating to CCPs established in Singapore;
- the Swiss Financial Market Authority (FINMA) relating to CCPs established in Switzerland;
- the Commodity Futures Trading Commission (CFTC) relating to CCPs established in the United States, which is a supplemental arrangement to the MoU signed in 2016; and
- the Securities and Exchange Commission (SEC) relating to CCPs established in the United States.

ECB publishes updated policy on options and discretions for bank supervision

The European Central Bank (ECB) has [published](#) an updated version of its policies outlining how it applies the options and discretions available to it under EU banking rules in its supervision of banks.

The amendments are intended to account for legislative changes that have been introduced since the ECB first adopted the policies in 2016, particularly those related to the application of liquidity requirements. The changes are implemented through the following updated instruments:

- an ECB Guide setting out guidance for joint supervisory teams in relation to significant institutions (SIs);
- an ECB Regulation in which the ECB exercises several generally applicable options and discretions in respect of SIs;
- an ECB Recommendation addressed to national competent authorities (NCAs) regarding less significant institutions (LSIs); and
- an ECB Guideline to NCAs on generally applicable options and discretions in relation to LSIs.

The ECB consulted on the changes to its policy in June 2021 and has published a statement summarising the responses it received as well as its response to them. In light of the feedback, the ECB has made a small number of changes to the final version of the revised Guide. The amending Regulation, Recommendation and Guideline have all been published as consulted upon.

ECB issues Dear CEO letter on risk appetite frameworks for leveraged transactions

The ECB has issued a [Dear CEO letter](#) on its expectations regarding the risk appetite frameworks for leveraged transactions (LT RAFs) of significant institutions (SIs).

The ECB emphasises its concern that SIs have significantly increased their exposure to leveraged transactions and accelerated their leveraged lending activities over the past few years. Overall, it notes that risks in the global leveraged loan market are now higher than they were in the lead up to the financial crisis. It has also identified severe deficiencies regarding the management of these risks. As a result, it has identified leveraged finance as a key vulnerability of SIs that will require increased scrutiny and remedial actions going forward.

In its letter, the ECB reminds the SIs under its supervision that its expectations regarding good risk management practices, including the design and functioning of risk appetite frameworks, are set out in its Guidance on Leveraged Transactions. In particular, it expects SIs to:

- ensure they have in place an LT RAF that identifies, quantifies and limits risks in an appropriate manner;
- reduce their risk taking and increase the robustness of their stress testing for their LT portfolios; and
- reduce, in particular, their highly leveraged transaction (HLT) origination as a share of total origination to the low levels specified in the ECB's Guidance.

Digital finance: ECON and LIBE Committees adopt position on anti-money laundering measures for cryptoassets

The EU Parliament's Committees on Economic and Monetary Affairs (ECON) and Civil Liberties (LIBE) have [voted to adopt](#) their negotiating position on the EU Commission's proposal to extend the scope of rules on information accompanying transfers of funds to apply to certain cryptoassets.

The proposal is part of a package of legislative amendments designed to strengthen the EU's AML/CFT rules. It requires cryptoasset service providers to collect and make accessible full information about the sender and beneficiary of any cryptoasset transfers, with the intention of improving the traceability of cryptoasset transfers and the identification of suspicious transactions.

Under its negotiating mandate, the EU Parliament is proposing to amend the Commission's proposal to, among other things:

- require that all transfers of cryptoassets, including those from un-hosted wallets, include information on the source of the asset and its beneficiary. Person-to-person transfers conducted without a third party, such as a cryptoasset trading platform, would be exempt;
- remove the current minimum thresholds and exemptions for low-value transfers;
- require the European Banking Authority (EBA) to create a public register of businesses and services involved in cryptoassets that may have a high risk of money laundering (ML), terrorist financing (TF) or other criminal activities; and
- require providers to verify that the source of cryptoassets is not subject to restrictive measures or a ML/TF risk before transferring the assets to beneficiaries.

The EU Council adopted its negotiating position on 1 December 2021. Once a provisional political agreement is found between their negotiators, both institutions will formally adopt the regulation.

FSB publishes 2022 work programme

The Financial Stability Board (FSB) has published its [2022 work programme](#), setting out its planned priorities and initiatives for the coming year, as well as its key deliverables to the G20 Indonesian Presidency. These include:

- supporting international cooperation and coordination on current financial stability issues by, among other things, strengthening its forward-looking monitoring under its new surveillance framework and continuing its analysis of the lessons learnt from COVID-19;
- developing a systemic approach to addressing the resilience of non-bank financial intermediation;
- enhancing cross-border payments, including by reporting to the G20 on the progress made under its roadmap to enhance cross-border payments, which was published in October 2020;
- continuing work on the financial stability implications of technological innovations, with a particular focus on cryptoassets and decentralised finance (DeFi); and
- continuing work on its initiatives under the roadmap for addressing climate-related financial risks, which was published in July 2021. These include building and strengthening the analytical basis for monitoring climate-related risks to financial stability; identifying regulatory and supervisory approaches to address climate-related financial risks; and analysing progress in the implementation of the roadmap.

ISSB consults on proposed standards setting out general sustainability-related and climate-related disclosure requirements

The International Sustainability Standards Board (ISSB) has launched a [consultation](#) on its first two proposed standards. One sets out general sustainability-related disclosure requirements and the other specifies climate-related disclosure requirements.

The proposals have been developed in response to requests from G20 leaders, the International Organisation of Securities Commissions (IOSCO) and others for enhanced information from companies on sustainability-related risks and opportunities.

They build on the recommendations of the Task Force on Climate-Related Financial Disclosures (TCFD) and incorporate industry-based disclosure requirements derived from SASB standards. The proposals set out requirements for the disclosure of material information about a company's significant sustainability-related risks and opportunities that is necessary for investors to assess a company's enterprise value.

Comments are due by 29 July 2022.

HMT publishes response to CCP consultation feedback

Her Majesty's Treasury (HMT) has published its [response](#) to the feedback received on its consultation on an expanded resolution regime for central counterparties (CCPs).

HMT has confirmed that it intends to proceed with the reforms proposed in the consultation which include revising the UK CCP regime to grant the Bank of England (BoE) additional powers to mitigate the risk and impact of a CCP failure.

The response sets out feedback received on specific proposals including loss allocation tools, the no creditor worse off (NCWO) safeguard, and the second tranche of 'skin in the game' (SSITG).

HMT acknowledges that it is important to ensure that the BoE has the powers it needs as soon as possible to ensure it can manage a CCP failure in the most effective way, whilst also ensuring that industry is provided with a reasonable lead in time to make the appropriate changes required as part of the expanded regime. It intends for legislation to be introduced when parliamentary time allows and further information on proposed legislation and implementation timings will be published in due course.

The BoE intends to consult separately on certain aspects of the new regime, including SSITG.

UK EMIR: New equivalence decision on US made

The [European Market Infrastructure Regulation \(United States of America Regulated Market Equivalence\) Regulations 2022](#) have been made.

Under the onshored UK version of the European Market Infrastructure Regulation (UK EMIR), the Regulations revoke the existing equivalence decision for the Commodity Futures Trading Commission (CFTC) that is an onshored UK version of the EU's equivalence decision and re-enact it with an updated annex.

The annex lists designated contract markets (DCM) in the US authorised by the CFTC. Since the original EU equivalence decision, the list of CFTC-authorized DCMs in the US has changed, and this has been reflected in the new Regulations. If further markets obtain CFTC authorisation, they will not benefit from the decision until they are listed in an annex to an equivalence decision.

The explanatory memorandum states that HM Treasury considers the CFTC regime to be equivalent on an outcomes basis and is comfortable extending the scope of its equivalence decision to all current CFTC-authorized markets.

The Regulations will enter into force on 20 April 2022.

FCA publishes call for input on use of synthetic data in financial services

The Financial Conduct Authority (FCA) has launched a [call for input](#) on the use of synthetic data in financial services. The FCA notes that there is an increasing demand for large volumes of high-quality data to help develop and train innovative models and systems in the financial services sector. As financial data is frequently sensitive and subject to data protection obligations, the FCA is seeking to understand the extent to which synthetic data, i.e. statistically realistic but 'artificial' data, could meet these demands instead.

In particular, the call for input seeks comments on:

- existing market attitudes towards synthetic data and its potential to support innovation in financial services;
- current usage of synthetic data and the processes used to generate it;

- priority use cases for synthetic data;
- useful qualities and content of synthetic data sets;
- the role of regulators in the provision of synthetic data;
- potential limitations and drawbacks of synthetic data; and
- any other issues or considerations relating to synthetic data not covered by the call for input.

Comments are due by 22 June 2022.

BoE and PRA publish discussion paper on liquid asset usability

The Bank of England (BoE) and Prudential Regulation Authority (PRA) have published a [discussion paper](#) on supporting liquid asset usability under the prudential liquidity framework.

The liquidity coverage ratio (LCR) requires banks to hold large enough stock of high quality liquid assets (HQLA) to meet their payment obligations in the case of severe short-term stress. However, the BoE and PRA are concerned that banks may be reluctant to draw on their HQLA in periods of unusual liquidity pressures, possibly to the extent that it is limiting the benefits of the flexibility built into the framework.

The paper considers the usability of banks' stocks of HQLA and seeks views from banks, wider participants, and other interested parties to improve understanding of:

- to what extent banks feel constrained in their ability to draw on their stock of HQLA to meet unusual liquidity demands;
- what factors affect this; and
- to what extent it is desirable that banks feel more able to draw on their HQLA, and how this could be achieved.

The BoE and PRA also intend to use the paper to inform their contribution to the ongoing work of the Basel Committee on Banking Supervision (BCBS) on the evaluation of Basel III reforms.

Comments are due by 30 June 2022.

PSR publishes annual plan for 2022/23

The Payment Systems Regulator (PSR) has published its [annual plan and budget for 2022/23](#).

The PSR believes that the COVID-19 pandemic has shown how essential payment systems are and the need for them to be resilient and convenient to allow for rapid changes to the way people pay. It acknowledges the evolving payments and landscape and expects global events which impact the cost of living to present further challenges.

The main plans included in the report are:

- offering access, protection and choice for everyone that uses payment systems to ensure they are fit for the future;
- increasing competition between different payment systems, including by unlocking the potential of account-to-account payments; and

- building on the advances made in 2021/22 and investigating further steps that can be taken to protect people from authorised push payment (APP) fraud.

BaFin issues new circular on high-risk jurisdictions for money laundering and terrorist financing

The German Federal Financial Supervisory Authority (BaFin) has issued a new anti-money laundering [circular](#) (Circular 04/2022 (GW)) on due diligence requirements with respect to high-risk jurisdictions that have strategic deficiencies in their systems to counter money laundering and terrorist financing, which pose significant risks for the international financial system. Circular 04/2022 is addressed to all entities obligated under the Money Laundering Act (Geldwäschegesetz) and supersedes previous circulars on EU and FATF high risk jurisdictions country lists relating to deficiencies in combating money laundering, terrorist financing, and financing of proliferation.

Circular 04/2022 (GW) takes into consideration:

- Delegated Regulation (EU) 2016/1675 of 14 July 2016 as amended by the Delegated Regulation (EU) 2022/229 of 7 January 2022, which relates to the Democratic People's Republic of Korea, the Islamic Republic of Iran, Afghanistan, Barbados, Burkina Faso, Haiti, Jamaica, Yemen, Jordan, Cayman Islands, Cambodia, Mali, Morocco, Myanmar, Nicaragua, Pakistan, Panama, Philippines, Senegal, Zimbabwe, South Sudan, Syria, Trinidad, Tobago, Uganda and Vanuatu;
- the FATF statement on high-risk jurisdictions subject to a call for action of 4 March 2022 relating to the Democratic People's Republic of Korea and the Islamic Republic of Iran; and
- the FATF report of 4 March 2022 on jurisdictions under increased monitoring relating to Albania, Barbados, Burkina Faso, Cambodia, Cayman Islands, Haiti, Jamaica, Jordan, Mali, Malta, Morocco, Myanmar, Nicaragua, Pakistan, Panama, Philippines, Senegal, South Sudan, Syria, Turkey, Uganda, the United Arab Emirates and Yemen.

In Circular 04/2022 (GW) BaFin specifies the legal consequences and anti-money laundering due diligence requirements under the Money Laundering Act and, in particular:

- sets out in detail the requirements with respect to the Democratic People's Republic of Korea and the Islamic Republic of Iran together with an explicit reference to BaFin's respective general decrees;
- points out continued enhanced due diligence requirements with respect to Afghanistan, Barbados, Burkina Faso, Cambodia, Haiti, Jamaica, Yemen, Jordan, Cayman Island, Mali, Morocco, Myanmar, Nicaragua, Pakistan, Panama, Senegal, South Sudan, Syria, Trinidad, Tobago, Uganda, Vanuatu and Zimbabwe;
- explains that with respect to Albania, Malta, Turkey and the United Arab Emirates, which are listed as jurisdictions under increased monitoring by the FATF but are not included in the Delegated Regulations, no additional requirements are to be observed but their individual country situation is to be considered; and
- calls on obligated entities additionally to take into account the financial sanctions published on the website of Deutsche Bundesbank (the German

national central bank) as well as the overview of cross-border threats set out in annex 4 of the National Risk Analysis (Nationale Risikoanalyse).

CSSF updates reporting requirements guidance for credit institutions

The Commission de Surveillance du Secteur Financier (CSSF) has issued an updated version of its reporting requirements [guidance](#) for credit institutions. The updates relate to reporting formats and technical specifications set out in Chapter 5 of the guidance document and are largely EBA driven. The CSSF's updated publication also includes a mark-up against the previous version dated 14 January 2022.

CNMV and General Directorate of National Police enter into MoU on prosecution of financial fraud committed by unauthorised persons

The Spanish Securities Market Commission (CNMV) and the General Directorate of National Police (DGP) have [entered into a memorandum of understanding](#) regulating the key aspects of their mutual cooperation in the prosecution of financial fraud when committed by unauthorised persons (MoU).

The MoU is intended to enhance the level of cooperation between both institutions by:

- ensuring there is a swift exchange of information;
- establishing specific communication channels for such information exchange; and
- creating an *ad hoc* monitoring panel.

The MoU enables the CNMV to notify the Financial & Tax Crime Team within the National Police directly and 'ex officio' of any indications of criminal offences (i.e., financial fraud) discovered when investigating or taking enforcement action against unauthorised persons purportedly providing or marketing investment services within Spain.

Ministry of Economic Affairs and Digital Transformation consults on draft Royal Decree amending Royal Decree 304/2014 on prevention of money laundering and terrorist financing

The Ministry of Economic Affairs and Digital Transformation has initiated a public [consultation](#) on a future draft Royal Decree amending Royal Decree 304/2014, dated 5 May, enacting the implementing regulation of Act 10/2010, 28th April on the prevention of money laundering and terrorist financing.

The draft Royal Decree is intended to further develop and regulate the changes made to Act 10/2010, 28th April on the prevention of money laundering and terrorist financing (AML/CTF Act) by Royal Decree-Act 7/2021, dated 27 April, which, amongst other things, implemented Directive (EU) 2018/843 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (AMLD5) into Spanish domestic legislation.

The main questions raised under the consultation focus on whether:

- any of the AML/CTF obligations should be further specified;

- client-related KYC/ID obligations are sufficient and proportionate;
- the scope of statutory-driven enhanced and simplified due diligence measures should be amended;
- the functioning of the financial holdings register should be updated;
- specific developments are needed in relation to crypto service providers; and
- the current sanctions and asset-freezing regime should be revisited.

Comments are due by 13 April 2022.

Green and Sustainable Finance Cross-Agency Steering Group releases assessment of carbon market opportunities for Hong Kong

The Green and Sustainable Finance Cross-Agency Steering Group has published its [preliminary feasibility assessment](#) of carbon market opportunities for Hong Kong.

The paper prepared by the Carbon Market Workstream of the Steering Group discusses how Hong Kong's role as an international financial centre, as the gateway to Mainland China, and as a regional certification hub can potentially add value to carbon market development. In addition, the paper makes recommendations to the Steering Group on the way forward and highlights the need for Hong Kong to develop the necessary market structure and regulatory models to link up international investors with Mainland China's carbon markets.

The Steering Group has endorsed the plan set out in the paper. The Carbon Market Workstream co-chaired by the Securities and Futures Commission and Hong Kong Exchanges and Clearing Limited will consider which market and regulatory model would be the most appropriate, and will prepare a detailed roadmap, implementation plan and indicative timeline after consulting with market experts and relevant authorities.

Australian Government responds to review of insolvent trading safe harbour

The Australian Government has published its [response](#) to the review of insolvent trading safe harbour provisions which were established under the Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017 as part of the Government's national innovation and science agenda.

The 2021 review took place between August and November 2021 and was tabled before the Parliament on 24 March 2022 along with the Government's response paper. In its response, the Government has highlighted its support for the enhancement of the operation of the safe harbour provisions, to ensure the safe harbour remains fit for purpose in terms of supporting companies to restructure and survive.

Among other things, the Government has agreed to:

- amend section 588GA(1)(a) of the Corporations Act 2001 (Act) to include a reference to a person starting to suspect the company is in financial distress (in addition, and as an alternative to, a person starting to suspect that the company may become or be insolvent);
- amend section 588GA(1)(b) to specifically refer to debts incurred in the ordinary course of business;

- develop a plain English 'best practice guide' to safe harbour wherein the guide sets out general eligibility criteria for appropriately qualified advisers; and
- amend subsections 588GA(4)(a) and 588GA(4)(a) to align the wording of those provisions with the wording of the employee entitlement safeguard in Regulation 5.3B.24.

[Response paper and related documents](#)

ASIC remakes sunseting class order on when debentures can be called secured notes

The Australian Securities and Investments Commission (ASIC) has [remade](#) the Class Order [CO 12/1482] titled 'When debentures can be called secured notes', which was due to sunset on 1 April 2022.

The new instrument is intended to continue allowing debenture issuers to describe their debentures as 'secured notes' in circumstances where security has been provided over intangible property, subject to various conditions outlined in detail in the instrument. The new instrument will be effective until 29 March 2025.

ASIC had previously launched a public consultation in July 2021 through 'Consultation Paper 344' and received one submission, which was supportive of the proposed recommendation to remake [CO 12/1482] without substantial changes.

RECENT CLIFFORD CHANCE BRIEFINGS

Congress passes Cyber Incident Reporting for Critical Infrastructure Act

On 15 March 2022, President Biden signed the Cyber Incident Reporting for Critical Infrastructure Act of 2022 as part of the Consolidated Appropriations Act of 2022. The Act requires critical infrastructure providers to report substantial cyber incidents within 72 hours, report ransomware attack payments within 24 hours, and submit periodic updates on ongoing cyber incidents. This statute is the first federal law to require reporting of cyber incidents across a wide range of industries. These requirements will take effect upon the finalization of implementing regulations by the Cybersecurity and Infrastructure Security Agency (CISA).

This briefing paper discusses the Act and its reporting requirements.

<https://www.cliffordchance.com/insights/resources/hubs-and-toolkits/talking-tech/en/articles/2022/03/congress-passes-broad-legislation-requiring-critical-infrastruc.html>

C L I F F O R D C H A N C E

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