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DCM Round Up: June 2023

Welcome to our periodic round up of key developments for DCM. Further details on some of these topics can also be found on the [Financial Markets Toolkit](#).

For a more detailed service please contact one of our experts, who can discuss in detail how these developments will affect your business and transactions.

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[LIBOR / RFRs](#)

LIBOR: A few reminders on USD Panel LIBOR cessation

In an [announcement](#) on 3 April 2023, the UK FCA confirmed that it will compel ICE Benchmark Administration Limited (IBA) to continue publication of the 1-, 3- and 6-month US dollar LIBOR settings after 30 June 2023 until 30 September 2024, but using a 'synthetic' methodology. Further information is contained in its [May 2023 Feedback Statement](#). Final notices will be published by the UK FCA on 1 July 2023.

In terms of contractual continuity, for English law-governed "tough legacy" contracts which reference USD LIBOR, the UK [Critical Benchmarks \(References and Administrators' Liability\) Act 2021](#) provides that, unless relevant fallbacks have been agreed, the relevant rate in the contract (or other arrangement) should be read as meaning the adjusted synthetic rate. The UK legislation was drafted to be neutral as to which designated benchmark was covered and, accordingly, will apply to USD LIBOR in

that same way as for Sterling and Japanese Yen LIBOR rates. For more background on contractual continuity under the Act, see our December 2021 [briefing](#).

Separately, on 12 April, the FCA, Bank of England and Working Group on Sterling Risk-Free Reference Rates published a [joint statement](#) on the transition away from USD LIBOR to risk-free reference rates (RFRs). The statement encourages market participants:

- actively to transition USD LIBOR contracts ahead of the cessation of the USD LIBOR panel;
- to ensure readiness for implementation of USD LIBOR fallbacks, including planned central counterparty (CCP) conversion events and operationalisation of the ISDA 2020 IBOR Fallbacks Protocol;
- to ensure they transition to the most robust RFRs; and
- to continue actively to transition any remaining legacy contracts from synthetic GBP LIBOR (ceasing in March 2024) to SONIA.

With regard to RFRs and Term SOFR, ARRC continues to suggest limited use of Term SOFR. In ARRC's revised 21 April 2023 [best practice recommendations](#), bonds remain out of scope of the products for which Term SOFR is recommended. ARRC continues to recommend overnight SOFR and SOFR averages for all products.

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EU REGULATORY

EU Commission legislative package on bank crisis management and deposit insurance regime

On 18 April, the European Commission published a [package of reforms](#) that will amend the Banking Resolution and Recovery Directive, the Single Resolution Mechanism Regulation and the Deposit Guarantee Scheme Directive (known as **CMDI**). The package proposes changes to the resolution triggers to make it easier to take resolution action under the resolution regime and to resolve small and medium sized banks. The package also proposes to harmonise treatment of deposits in ordinary insolvency proceedings and to introduce several changes to the rules on deposit guarantee schemes. More detail is available in our [Client Briefing](#).

EU Benchmark Regulation

On 1 March, the European Commission launched a [call for evidence](#) in relation to the Benchmark Regulation (**BMR**). The call for evidence requests feedback on the use and regulation of third-country benchmarks including climate transition benchmarks. The intention is to ensure continued access to the use of third country benchmarks. The European Commission is due to respond by end of Q2 2023.

Capital Markets Union: EU Commission adopts retail investment package

On 24 May, the EU Commission adopted a retail investment strategy aimed at streamlining and modernising investor protection rules. See [Press release](#) and [webpage](#).

The legislative package consists of a proposed Omnibus Directive amending MiFID2, IDD, Solvency II, the UCITS Directive and AIFMD, and a proposed Regulation amending the PRIIPs Regulation. Briefly, these are measures proposed as part of the CMU plan to increase and improve retail access and

investment. Areas of interest include a suggestion that a make-whole clause should not make a corporate bond a PRIIP.

In terms of timing, public feedback is sought by **14 August 2023** (although the 8-week deadline will continue to be extended until translations of the proposals are available). It is also worth noting that, once adopted, there will be at least 12 to 18 months before the Directive comes into force. The Regulation will apply 18 months after Official Journal publication, to allow time for an RTS.

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UK REGULATORY

FCA Engagement Papers

On 18 May, the FCA published four Engagement Papers outlining its approach to, and seeking feedback on, the development of its rules on the admission of securities to trading on a UK market and prospectus content (amongst other things). These rules, taken together with UK HM Treasury's illustrative statutory instrument (the **Financial Services and Markets Act 2000 (Public Offers and Admissions to Trading) Regulations 2023**), complete the picture of how the new UK prospectus regime will look. Further Engagement Papers are expected imminently.

While the Engagement Papers set out the positions the FCA is minded to take, including the areas in which it is considering adopting a different approach to that under the existing UK prospectus regime, they are just the starting point for the conversations with stakeholders. The FCA has stated that it is adopting a new collaborative and "listening" approach to feedback. It will be undertaking in-person roundtable discussions with market participants during the summer with written feedback to be submitted in the autumn. The engagement process is intended to result in the FCA publishing draft rules for consultation in Q1 2024.

Clifford Chance will be part of those stakeholder discussions with the FCA over the summer. Key issues include: preserving existing Prospectus Regulation admission exemptions; clarification on the incorporation by reference proposals; requesting refinements to the "necessary information test" to remove the "creditworthiness" limb; incorporation of future financial statements by reference; the proposals relating to increased retail participation and how these may work in practice; the protected forward looking statement regime and the rules regarding ESG debt (green, social and sustainable use of proceeds bonds and sustainability-linked bonds) and other ESG disclosures.

FCA guidance on accounting equivalence

On 20 February, the FCA published its **Primary Market Bulletin 43** which confirmed that Chinese GAAP is considered to be an equivalent accounting standard for the purposes of the Disclosure and Transparency Rules.

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ESG / SUSTAINABILITY

Provisional EU Green Bond Regulation

On 28 February, the European Commission, Council and Parliament reached a **provisional agreement** on the new Green Bond Regulation (the **Regulation**) and this text was published on 4 May. The provisional agreement requires formal approval by the European Council and European Parliament and publication in the Official Journal. This is expected in the autumn and there is a 12-month period before it takes effect. Any green bond issued in compliance with the Regulation can use the 'EuGB' or 'European Green Bond label'.

A short summary of the key points of the Regulation are provided here but for a detailed discussion of the Regulation and its potential impact on the market please see our **Client Briefing**.

- The proposed Regulation is a voluntary standard that both EU and non-EU issuers can choose to adopt provided they apply the bond proceeds to activities that are environmentally sustainable in compliance with the EU Taxonomy.
- Issuers must prepare pre-issuance and post-issuance disclosures in accordance with the specified content and format requirements of the Regulation.
- External reviews must be undertaken on these disclosures and the reviewer must provide an opinion on compliance with the Regulation and confirmations regarding the issuer's post-issuance allocation and impact statements.
- The issuer's disclosures and related external reviews must be published on the issuer's website and remain available for 12 months after the maturity of the relevant bond but there are no requirements to include these in a prospectus.
- The Regulation sets up a new supervisory regime for external reviewers who must be registered with ESMA. This applies to both EU and non-EU external reviewers.
- The Regulation also grants regulatory and sanction powers to the National Competent Authorities to ensure compliance with the Regulation.

EU Corporate Sustainability Reporting Directive and potential impact on non-EU issuers

A key piece of European sustainable finance legislation, the **Corporate Sustainability Reporting Directive (CSRD)**, entered into force on 5 January 2023 and will begin to apply in relation to financial years from January 2024. While CSRD applies primarily to EU entities it has extra territorial scope as regards certain entities and this includes third country issuers which have equity or low denomination debt admitted to trading on an EU regulated market. These issuers are brought into scope by virtue of changes made to the Transparency Directive by CSRD. The CSRD changes require all issuers subject to the Transparency Directive to prepare sustainability reports in accordance with CSRD.

CSRD requires in-scope entities to include in their management reports specified sustainability related information prepared in accordance with EU developed sustainability reporting standards. Such entities must also obtain an audit report on their sustainability reports.

The CSRD requirements are being introduced on a staggered basis but in relation to the Transparency Directive changes will require issuers to produce sustainability information in their management reports for financial years beginning on or after 1 January 2024.

Environmental, Social and Governance (ESG) ratings

On 30 March, UK HM Treasury launched a **consultation** on extension of its regulatory perimeter to include ESG rating providers. The consultation recognises the widely publicised concerns about ESG ratings, in particular a lack of transparency around methodologies used, a lack of comparability of

ratings given by different providers and potential conflicts of interest. The consultation is looking for views on HM Treasury's initial policy proposals. It closes on 30 June 2023.

On 13 June, the European Commission published a proposal for a **regulation on ESG rating activities**. This proposal sets out a registration and supervisory regime for ESG rating providers that provide ESG ratings in the European Union, similar to the Credit Rating Agencies Regulation and the EU Green Bond Regulation in relation to external reviewers. The regulation aims to improve the transparency, reliability and comparability of ESG ratings, however it does not seek to standardise methodologies. It will apply to entities providing ratings to the public but not entities or financial institutions that develop ESG ratings for their own internal purposes. The proposal needs to be considered and agreed by the European Council and European Parliament. It will apply six months after publication in the Official Journal.

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CLIENT BRIEFINGS

The below list of client briefings and presentations may be of interest.

The EU's Gold Standard – the final EU Green Bond Standard has landed but what does it mean for the green bond market? (May 2023)

The Proposed UK Prospectus Reforms: A Change in Approach? (June 2023)

EU Reforms Bank Crisis Management and Deposit Insurance Regime (April 2023)

Clifford Chance Perspective Series: EU and UK debt prospectuses (6 June 2023)

Buy-side Regulatory Horizon Scanner – this covers a number of EU and UK developments, including on PRIIPs, the FCA consumer duty and various ESG initiatives (April 2023)

Ukraine: the latest global sanctions and export controls (6 June 2023)

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