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SMM Regulation: ECB Amending Regulation and Decisions on financial reporting published in OJ

[European Central Bank \(ECB\) Regulation \(EU\) 2023/1678](#) amending ECB Regulation (EU) 2015/534 on the reporting of supervisory financial information (the Financial Reporting Regulation) has been published in the Official Journal, alongside two ECB Decisions.

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[ECB Decision \(EU\) 2023/1681](#) lays down procedures for submitting to the ECB information reported to national competent authorities (NCAs) by supervised entities in accordance with Implementing Regulation (EU) 2016/2070, Implementing Regulation (EU) 2021/451 and Implementing Regulation (EU) 2021/453 and repeals and replaces Decision ECB/2014/29.

[ECB Decision \(EU\) 2023/1680](#) relates to requirements for NCAs to provide the funding plans of certain significant and less significant credit institutions to the ECB and establishes harmonised procedures for submitting the funding plans. It repeals and replaces ECB Decision (EU) 2017/1198 in order to align submission to the ECB by NCAs of credit institutions' funding plans with ECB Decision (EU) 2023/1681.

The Amending Regulation also aligns the Financial Reporting Regulation with ECB Decision (EU) 2023/1681.

The Regulation will enter into force on 21 September 2023 and the Decisions take effect on the day they are notified to the NCAs of participating Member States.

CRR: EU Commission adopts RTS on shadow banking entities

The EU Commission has adopted a draft Commission Delegated Regulation supplementing the Capital Requirements Regulation (CRR) with [regulatory technical standards](#) (RTS) specifying the criteria for the identification of shadow banking entities under Article 394(2).

The RTS specify:

- the criteria for identifying both shadow banking and non-shadow banking entities;
- the definition of banking activities and services; and
- the criteria for excluding entities established in third countries from being deemed to be shadow banking entities.

The RTS are aligned with the European Banking Authority's (EBA) guidelines on limits on exposures to shadow banking entities which carry out banking activities outside a regulated framework under Article 395(2) of the CRR.

The RTS further specify that entities that carry out banking activities or services that have been authorised and are supervised in line with the regulatory framework must not be considered as shadow banking entities and that the same treatment must apply to entities that are exempted or excluded from the application of some of those legal acts. All other entities that provide banking activities and services must be considered as shadow banking entities, with specific rules applying to certain collective investment undertakings. The RTS also differentiate between institutions and other entities established in a third country.

The RTS will enter into force on the twentieth day following that of their publication in the Official Journal.

Decentralised Finance: IOSCO consults on policy recommendations to address market integrity and investor protection concerns

The International Organization of Securities Commissions (IOSCO) has published a [consultation report](#) setting out nine policy recommendations to address market integrity and investor protection concerns arising from Decentralised Finance (DeFi).

The recommendations cover six key areas:

- understanding DeFi arrangements and structures;
- achieving common standards of regulatory outcomes;
- identification and management of key risks;
- clear, accurate and comprehensive disclosures;
- enforcement of applicable laws; and
- cross-border cooperation.

Comments are due by 19 October 2023. IOSCO aims to finalise its DeFi recommendations around the end of 2023.

Cryptoassets: FSB and IMF publish synthesis paper on macroeconomic and financial stability risks

The Financial Stability Board (FSB) and International Monetary Fund (IMF) have published a [report](#) intended to outline a comprehensive policy and regulatory response to cryptoasset activities.

The report synthesises the IMF's and FSB's policy recommendations and standards by illustrating macroeconomic and financial stability implications of cryptoasset activities, how they may interact, and how the IMF and FSB's policy recommendations fit together. The report also encourages implementation of the Financial Action Task Force (FATF) anti-money laundering and counter-terrorist financing (AML/CFT) standards to address risks to financial integrity and mitigate criminal and terrorist misuse of the cryptoassets sector.

The report concludes that a comprehensive policy and regulatory response for cryptoassets is necessary to address the risks of cryptoassets to macroeconomic and financial stability. In particular, it argues that:

- jurisdictions should safeguard monetary sovereignty and strengthen monetary policy frameworks, guard against excessive capital flow volatility and adopt unambiguous tax treatment of cryptoassets;
- comprehensive regulatory and supervisory oversight of cryptoassets can help to address financial stability and financial integrity risks while supporting macroeconomic policies;
- comprehensive regulatory and supervisory oversight of cryptoassets should be a baseline to address macroeconomic and financial stability risks; and
- some jurisdictions, in particular emerging markets and developing economies, may want to take additional targeted measures that go beyond the global regulatory baseline to address specific risks.

The report sets out a roadmap, developed together with relevant international organisations and standard-setting bodies, to ensure the effective implementation of the FSB's and IMF's recommendations and standards. The roadmap includes currently planned and ongoing work to:

- build institutional capacity beyond G20 jurisdictions;
- enhance global coordination, cooperation, and information sharing; and
- address data gaps necessary to understand the rapidly changing cryptoasset ecosystem.

FSB Chair writes to G20 Leaders ahead of New Delhi summit

The Chair of the FSB, Klaas Knot, has written two letters to the G20 Leaders ahead of their upcoming summit scheduled to take place in New Delhi on 9-10 September 2023.

The [first letter](#) outlines the work the FSB has undertaken under the Leadership of India's G20 Presidency to address existing vulnerabilities in the financial system and enhance its resilience to structural change. Amongst other things, the letter:

- notes the challenges of inflation and slowing growth and warns that rising interest rates could impair the capacity of borrowers to service global debt;
- calls on authorities to monitor asset quality in sectors sensitive to higher interest rates, such as real estate;
- highlights concerns over leverage build-up in the non-bank financial intermediation (NBFi) sector;
- notes the FSB's intention to publish a report on preliminary lessons learned for resolution and policy priorities going forward, following the banking sector turmoil in March 2023; and
- outlines the FSB's work to address the financial stability implications of digitalisation and climate change.

The [second letter](#) provides an update on the G20 cross-border payments roadmap. It describes efforts which focus on concrete projects that aim to make a difference across various parts of the cross-border landscape and further developing the partnership with the private sector to achieve the roadmap goals. The letter highlights the need for continued political support and sustained effort by the public and private sectors to meet the G20 targets by 2027 and notes the FSB's intention to submit its first report with data on progress towards the quantitative targets to G20 finance ministers and central bank governors in October 2023.

FSB publishes reports on non-bank financial intermediation

The FSB has published its third annual progress report on enhancing the resilience of non-bank financial intermediation (NBFi) and a report on NBFi leverage.

The [progress report](#) sets out the findings of analytical work on key amplifiers of liquidity stress and describes the policies being developed to reduce excessive spikes in liquidity demand, including:

- revisions to FSB Recommendations intended to address structural liquidity mismatch in open-ended funds by providing greater clarity on redemption terms and by promoting greater use of liquidity management tools; and
- policies intended to enhance margining practices, including high-level recommendations on liquidity risk management and governance, and further guidance to increase transparency and evaluate initial margin responsiveness in centrally cleared markets.

The [leverage report](#), which forms part of the FSB's work on NBF1 resilience, provides an overview of aggregate NBF1 leverage trends across FSB jurisdictions and sets out possible actions for addressing data gaps and examples of policy responses for addressing vulnerabilities and amplification factors, such as:

- implementing agreed FSB minimum standards and haircut floors on non-centrally cleared securities financing transactions (SFTs);
- developing additional rules on haircuts and margins;
- assessing whether to extend leverage rules to a wider range of financial institutions;
- enhancing prime broker risk management;
- improving market participants' liquidity preparedness;
- augmenting the resilience of liquidity provision in core funding markets during times of stress; or
- enhancing stress tests used by non-bank investors and authorities.

Both reports further outline work that the FSB and standard-setting bodies are undertaking, or intend to undertake, to assess and address systemic risk in NBF1.

NGFS publishes conceptual framework for nature-related financial risks

The Network for Greening the Financial System (NGFS) has published the beta version of its [conceptual framework](#) for nature-related financial risks.

The aim of the framework is to create a shared science-based understanding of, and common language for, nature-related financial risks to help central banks and financial supervisors navigate the complexities and challenges associated with assessing and addressing these risks.

NGFS publishes reports on climate-related litigation risks

The NGFS has published two reports on climate-related litigation.

The [first report](#) outlines recent trends in the area, highlighting that climate-related litigation is growing rapidly, not only in terms of the volume of cases being initiated, but also in terms of the legal arguments being used, and the diversity of addressees of such claims. The report notes that such litigation against states, public entities, and corporates can have a significant impact on the financial sector and that its increased relevance calls for central banks and supervisors to step up their monitoring and supervisory expectations. It also

notes that several cases have already been brought directly against defendants in the financial sector, including the first cases against a credit institution in 2023.

The [second report](#) focuses on micro-prudential supervision of the risks for financial institutions associated with the increase in climate-related litigation. It highlights the growing relevance of climate-related litigation to micro-prudential supervision. The report emphasises that supervisors need to identify risks drivers, transmission channels and exposures to properly assess ensuing financial risks to a financial institution, which can lead to direct (e.g. damages, fines, legal and administrative fees) and indirect (e.g. insurance pay-outs, credit losses or adverse business impacts) costs for financial institutions.

Financial Services and Markets Act 2000 (Exemptions from Financial Promotion General Requirement) Regulations 2023 published

The [Financial Services and Markets Act 2000 \(Exemptions from Financial Promotion General Requirement\) Regulations 2023](#) (SI 2023/966) have been made and laid before Parliament.

SI 2023/966 sets out the following exemptions for authorised persons from the requirement to obtain permission through a new regulatory gateway for the approval of financial promotions introduced by the Financial Services and Markets Act 2023 (FSMA 2023):

- authorised persons approving the financial promotions that they prepare which are communicated by unauthorised persons;
- authorised persons approving financial promotions of unauthorised entities that are part of the same group; and
- authorised persons (as a principal) approving financial promotions of their appointed representatives, in relation to regulated activities comprised in the carrying on of the business for which the authorised persons have accepted responsibility.

SI 2023/966 comes into force on 27 September 2023.

FCA consults on UK Insurance Distribution Directive

The Financial Conduct Authority (FCA) has published a [consultation paper](#) (CP23/19) on proposed rules to replace retained EU law (REUL) relating to the UK Insurance Distribution Directive (UK IDD), which is due to be repealed as part of the UK Government's implementation of the Smarter Regulatory Framework.

The FCA broadly intends to maintain the existing regulatory regime and seeks views on transferring requirements to the:

- Senior Management Arrangements, Systems and Controls sourcebook (SYSC);
- Conduct of Business sourcebook (COBS);
- Insurance: Conduct of Business sourcebook (ICOBS); and
- Product Intervention and Product Governance sourcebook (PROD).

The FCA is not proposing to introduce new or remove existing requirements, although it will consider in the future whether substantial changes are

required, such as in relation to how some rules apply to the London market and, as part of its review of UK MiFID, the operation of rules for insurance-based investment products (IBIPs).

Comments are due by 9 October 2023.

FCA launches review of treatment of politically exposed persons

The FCA has published the [terms of reference](#) for its review of the treatment of domestic politically exposed persons (PEPs) by financial services firms.

The FCA's review is intended to assess how regulated firms are meeting the anti-money laundering (AML) legislation and the FCA guidance to conduct proportionate and risk-based due diligence on their PEP clients based in the UK.

In particular, the FCA will consider how firms are:

- applying the definition of PEPs to individuals;
- conducting proportionate risk assessments of UK PEPs, their family members and known close associates;
- applying enhanced due diligence and ongoing monitoring proportionately and in line with risk;
- deciding to reject or close accounts for PEPs, their family members and known close associates;
- effectively communicating with their PEP customers; and
- keeping their PEP controls under review to ensure they remain appropriate.

The FCA intends to report its conclusions from the review by the end of June 2024.

FCA sets out expectations ahead of incoming cryptoasset marketing rules

The FCA has published a [letter](#) setting out its expectations regarding firm's preparations for the cryptoasset financial promotions regime coming in on 8 October 2023.

In particular, the FCA has indicated that in response to industry readiness it will give cryptoasset firms more time to implement certain changes by introducing a modification by consent process. The effect of the modification will be to delay the implementation of the 'back end' Direct Offer Financial Promotion (DOFP) rules by three months for any approved firms. Specifically rules in COBS 4.10.2AR, COBS 4.12A.15R and COBS 10.1.2R related to personalised risk warnings, 24-hour cooling off period, client categorisation and appropriateness assessments. This would give such firms until 8 January 2024 to introduce these features that require greater technical development, while the core rules would still come into effect from 8 October 2023.

The FCA has also published [examples of good and poor practice](#) on firms' preparations for the new marketing rules.

Ministry of Finance and Polish Financial Supervision Authority publish communication on alternative

investment companies whose shares are admitted to trading on a regulated market or introduced to an alternative trading system

The Ministry of Finance and the Polish Financial Supervision Authority have [published](#) a joint standpoint stating that the amendments to the law (introduced by the Act Amending Certain Acts in Connection with Ensuring the Development of the Financial Market and the Protection of Investors on this Market) announced on 29 August 2023 should not be interpreted in a way that would lead to the exclusion of alternative investment companies (AICs) from trading on the stock exchange.

As noted in the communication, the purpose of the amendments is to regulate the turnover of participation rights in AICs primarily from the point of view of the possibility of their acquisition by retail clients outside organised trading.

Therefore, these amendments do not apply to such shares issued by AICs which on the date the aforementioned Act comes into force are admitted to trading on a regulated market or introduced to the alternative trading system.

ASIC publishes report on design and distribution obligations pertaining to retail OTC derivatives

The Australian Securities and Investments Commission (ASIC) has published a [report](#) (Report 770) on design and distribution obligations (DDO) pertaining to retail over-the-counter (OTC) derivatives.

Report 770 sets out ASIC's findings from a targeted review of compliance with the DDO by issuers of OTC derivatives to retail clients, including contracts for difference (CFDs), crypto derivatives and novel derivative arrangements, with practical observations for issuers and distributors of retail OTC derivatives and other financial products to consider when reviewing their product governance arrangements.

According to ASIC, over 60 Australian financial services licensees offer complex, high-risk OTC derivatives to retail clients in Australia. The review examined the DDO practices of a sample of issuers and follows earlier ASIC reviews in 2017, 2019, 2020 and 2022, which found that most retail clients lose money trading CFDs.

In the report, ASIC calls on issuers to:

- address their over-reliance on client questionnaires as a primary distribution filter;
- review their mass marketing of OTC derivatives; and
- make greater use of available data to assist the design of derivative products, target market determinations and distribution arrangements.

ASIC has indicated that to date, as a result of the review, it has issued 10 interim stop orders and commenced a civil penalty proceeding for alleged breaches of the design and distribution obligations by retail OTC derivative issuers. ASIC has also engaged with other product issuers to achieve changes to products and distribution practices.

RECENT CLIFFORD CHANCE BRIEFINGS

The EU financial services legislative pipeline

The race is on to agree the remaining proposals in the EU financial services legislative pipeline before the 2024 institutional changeover. So far, the 2019-24 Commission has proposed 52 legislative acts on financial services and cross-cutting issues particularly relevant to financial services, of which the European Parliament and the Council have agreed or provisionally agreed the texts of 21 acts.

Work to agree the outstanding proposals will intensify in the lead up to the Parliament elections in June 2024 and the next Commission taking office in October 2024 (although some proposals may be carried over to be agreed under the next Parliament and Commission). The Commission may also still submit additional proposals as it continues to work on other delayed and future measures.

This briefing paper sets out a timeline showing the state of play on the legislative proposals in the pipeline and providing an inventory of pending proposals and agreed acts and an indicative list of delayed and possible future legislative proposals.

<https://www.cliffordchance.com/briefings/2023/09/the-eu-financial-services-legislative-pipeline.html>

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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